88-1906

Supreme Court, U.S.
FILED
MAY 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1988

SIMON NASH,

Petitioner,

vs.

OTIS R. BOWEN, JOHN A. SVAHN, DONALD J. DEVINE, LOUIS B. HAYS, PHILIP T. BROWN and L. CHARLES LEONARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Does the independence from agency control, conferred upon Administrative Law Judges (ALJs) under the Administrative Procedure Act (APA), extend to matters pertaining to the performance of their quasi-judicial duties, or is it confined to such matters as pay, promotion, rotation of cases, and tenure?

2. Is the oral counseling of individual Social Security ALJs, by agency supervisory personnel, outside the normal appellate process, concerning the "correctness" of the ALJ's reversals of initial decisions in favor of the agency, an infringement upon the ALJ's right of decisional independence, regardless of the intent of the counselors?

3. Does a Social Security ALJ have standing to contest the legality of the Secretary's "Ruling of Non-Acquiescence" in a decision of the United States Court of Appeals for the Circuit within which the ALJ is assigned, as an infringement of the ALJ's decisional independence?

Parties

The petitioner is an Administrative Law Judge (ALJ), employed by the Secretary of Health & Human Services (Secretary) and assigned to the Buffalo, New York, field office of the Office of Hearings and Appeals (OHA) of the Social Security Administration.

The respondents are, respectively, the Secretary; the Commissioner of Social Security; the Director of the Office of Personnel Management; the Associate Commissioner of Social Security for Hearings and Appeals; the Chief Administrative Law Judge (CALJ) of the OHA; and the Regional Chief Administrative Law Judge (RCALJ) of Region II (New York)[1]. All are sued in their official capacities only.

[1] Since the beginning of this action in 1978, several persons have occupied the six positions. None of those named in the lower court's decision and judgment are currently serving. The present incumbents are: Louis W. Sullivan, Secretary; Dorcas R. Hardy, Commissioner; Constance Horner, Director; Eileen Bradley, Associate Commissioner; James R. Rucker, Jr., CALJ; and Irwin Bernstein, RCALJ. They are automatically substituted as parties under Rule 40.3 of this Court.

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Abbreviations

APA	Administrative Procedure Act
ALJ	Administrative Law Judge
CALJ	Chief Administrative Law Judge
RCALJ	Regional Chief Administrative Law Judge
ALJIC	Administrative Law Judge in Charge
SSA	Social Security Administration
OHA	Office of Hearings and Appeals

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review its judgment entered March 7, 1989, which affirmed a judgment of the United States District Court for the Western District of New York, dismissing the second amended complaint, after a non-jury trial.

Opinions Below

The United States Court of Appeals for the Second Circuit has rendered two decisions in this case. The opinion sought to be reviewed in this proceeding was filed on March 7, 1989, and is reprinted as Appendix A (App. p. 1a). It will be referred to as "*Nash II*". It will be reported as *Nash v. Bowen*, 869 F.2d 675.

The other Court of Appeals' opinion is *Nash v. Califano*, 613 F.2d 10, decided on January 7, 1980, and reprinted in Appendix E (App. p. 44a). In the opinion sought to be reviewed, the Court refers to this earlier opinion as "*Nash I*", and it will be so referred to herein.

The United States District Court for the Western District of New York rendered three written opinions, none of which has been reported, and one oral opinion. The four opinions are reprinted as Appendices B, C, D and F, as indicated in the Table of Contents. The six opinions below are reprinted in the appendices in reverse chronological order.

Jurisdiction

The opinion of the Court of Appeals was filed March 7, 1989. No petition for rehearing was filed. The mandate was issued on March 31, 1989 (Appendix G, App. p. 68a) and was adopted by the District Court on April 16, 1989 (Appendix H, App. p. 70a). Jurisdiction of this Court is conferred by 28 U.S.C. 1254.

Constitutional and Statutory Provisions

Constitutional questions as to separation of powers and judicial supremacy are raised by Claim No. 8, which challenges the Secretary's practice of publishing "Rulings of Non-Acquiescence" in decisions of Courts of Appeals with which he disagrees, even within the territorial limits of the jurisdiction of such courts.

The relevant provisions of the Social Security Act, the Administrative Procedure Act, and Rule 52 of the Federal Rules of Civil Procedure are reprinted in Appendix I (App. p. 71a).

Statement of the Case

The petitioner is one of approximately 700 Social Security ALJs who, under a direct delegation from the Secretary, hold hearings and issue decisions in cases arising under Section 205(b) of the Social Security Act (42 USC 405(b)). Over 95% of the cases involve the single issue of the disability of the claimant. The decisions of the ALJs are reviewable by the Appeals Council, a body of 15 members, which usually sits in panels of two members, and which has full authority to reverse or otherwise modify any and all decisions of the ALJs, either on its own motion or on appeal by a claimant from an adverse decision by an ALJ.

The petitioner, *pro se*, filed his original complaint in the United States District Court for the Western District of New York on May 30, 1978. The complaint alleged that six specific practices of the respondents infringed upon the decisional independence conferred upon him and all other Social Security ALJs under the Administrative Procedure Act (APA). The complaint sought declaratory and injunctive relief.

On September 18, 1978, the respondents moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted, under Rule 12(b)(6) of the Federal Rules of Civil Procedure, or in the alternative, for summary judgment, under Rule 56. The petitioner then retained counsel and filed his first amended complaint on December 20, 1978. The respondents renewed their motion to dismiss on January 8, 1979, and the petitioner moved for class action certification under Rule 23, on February 20, 1979. The District Court heard oral argument on the two motions on June 4, 1979, and, in an oral opinion following

argument, (a) denied the motion for class action certification; and (b) granted the motion to dismiss the complaint, on the ground that the petitioner lacked standing to maintain the action (App. p. 61a).

On appeal, the United States Court of Appeals for the Second Circuit reversed the decision of the District Court and remanded the case for further proceedings, *Nash v. Califano,* 613 F.2d 10 (*Nash I*) (App. p. 44a). The decision was handed down on January 7, 1980.

After the case was remanded to the District Court, there were protracted discovery proceedings and several motions regarding class action certification. No questions concerning those matters are involved in this proceeding.

In its opinion in *Nash I,* the Court of Appeals held that the petitioner had standing with respect to three of his six claims, namely those challenging the legality of (1) the "Peer Review Program", under which the decisions of ALJs were reviewed by supervisory agency personnel, outside the normal appellate process; (2) the imposition on ALJs of monthly numerical production goals; and (3) the attempt to influence the reversal rates of ALJs under a "Quality Assurance Program", by counseling them to bring their rates in line with the national average.

On September 29, 1982, the petitioner filed his second amended complaint, which realleged the six original claims and added two more. One of those added, designated Claim No. 8, challenged the legality of the Secretary's published "Rulings of Non-Acquiescence" in decisions of United States Courts of Appeals with which he disagrees.

On March 30, 1984, the petitioner moved for summary judgment. On May 29, 1985, the District Court denied the motion (App. p. 36a). The Court dismissed

Claims Nos. 5, 6 and 8, for lack of standing, and set the other claims for a non-jury trial, which was held on September 3, 4 and 9, 1985, and March 13, 1986. At the opening of the trial, the petitioner withdrew Claims Nos. 4 and 7, and the trial proceeded on Claims Nos. 1, 2 and 3, only—the same claims as to which the Court of Appeals, in *Nash I,* had found that the petitioner had standing. Thereafter, proposed findings and conclusions were filed by the parties, and oral argument was had on May 1, 1986. On December 31, 1987, the District Court filed its Memorandum and Order, deciding Claims Nos. 1, 2 and 3 in favor of respondents (App. p. 16a), and judgment was entered thereon on January 7, 1988 (App. p. 32a). An order amending the findings was entered on March 16, 1988 (App. p. 33a).

The petitioner appealed. The Court of Appeals heard oral argument on December 20, 1988, and, on March 7, 1989, issued its decision (*Nash II*), affirming the decision of the District Court (App. p. 1a).

In this proceeding, the petitioner seeks review of *Nash II,* insofar as it affirmed (a) the dismissal, on the merits, after trial, of Claim No. 3; and (b) the dismissal of Claim No. 8, on motion, for lack of standing. Claim No. 3 involves a specific type of oral counseling of individual ALJs, by agency supervisory personnel, outside the normal appellate process, with reference to their reversal decisions, that is, the cases in which the ALJs had decided in favor of claimants for Social Security benefits, thereby reversing the initial agency decisions. Since Claim No. 1 involves counseling generally, it is included in Claim No. 3, and therefore it need not be considered separately herein. Petitioner does not seek review of the decision below, insofar as it affirmed the dismissal of Claim No. 2, which involved monthly numerical production goals.

REASONS FOR GRANTING WRIT

1. There is an intra-circuit conflict between *Nash v. Califano*, 613 F.2d 10 (2nd Cir. 1980), (*Nash I*), and *Nash v. Bowen*, 869 F.2d 675 (2nd Cir. 1989), (*Nash II*), resulting in an apparent conflict between the Second Circuit and courts in other circuits.

2. The three questions presented in this proceeding are important questions of federal law, which have not been, but should be, settled by this Court.

(a) The questions directly affect about 700 ALJs employed by the Secretary to hear and decide contested Social Security claims. This case is a *de facto* class action. It was a *de jure* class action, *Nash v. Califano*, 31 FR Serv. 2d 1119, and would have remained such, but for the fact that the plaintiff (petitioner herein) could not afford to pay attorneys' fees, leading to the revocation of class action status, *Nash v. Califano*, 33 FR Serv. 2d 377.

(b) The questions directly affect more than 250,000 individual claimants for Social Security benefits whose appeals are heard and decided by petitioner and his colleagues each year.

(c) The questions indirectly affect about 300 other ALJs in other agencies of the United States, who hear and decide cases on a wide variety of matters.

(d) The questions indirectly affect the rights of thousands of citizens who are involved each year in hearings before such agencies.

ARGUMENT

I. There is an intra-circuit conflict between *Nash I* and *Nash II*, as to whether an ALJ has a right of decisional independence in the performance of his quasi-judicial duties, which involves an important question of federal law which has not been, but should be, settled by this Court.

Where there is an intra-circuit conflict, this Court has granted certiorari, *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950), especially where the case involves an important question of law which should be decided by this Court, *John Hancock Ins. Co. v. Bartels*, 308 U.S. 180 (1939). See also *Stern, Gressman & Shapiro*, "Supreme Court Practice", 6th Ed., pp. 204-205.

In *Nash I*, decided in 1980, the Court of Appeals for the Second Circuit held that an ALJ had standing to sue his employing agency for declaratory relief, where he alleged that agency action had infringed upon his right of decisional independence in the performance of his quasi-judicial duties (App. p. 44a). The Court held that the right was derived from the APA and from the Position Description of the ALJ.

In *Nash II*, decided in 1989, which is the subject of this proceeding, the same Court distinguished between standing to sue and a "private right of action to maintain his suit". It characterized as "*dictum*" the prior holding, in *Nash I* that an ALJ had a right of action, as well as standing. It relied on the case of *Council of and for the Blind of Delaware County Valley, Inc. v. Regan*, 709 F. 2d 1521, 1524-1525 (D.C. Cir. 1983), and it strongly intimated that the District Court should have dismissed the petitioner's causes of action for failure to state claims upon which relief could be granted (App. pp. 7a-8a). Petitioner submits that the case relied upon by the Court of Appeals is distinguishable from the instant case, because it is based upon the court's

construction of the Revenue Sharing Act as *not* indicating an intent on the part of Congress to confer a right of action on the particular plaintiffs, who, of course, are not identified in the statute in the same specific way that ALJs are identified in the APA. In *Nash I*, however, the Court of Appeals had held, in effect, that Congress had indeed intended to confer on ALJs, not only standing to sue, but also a right of action to vindicate their substantive right of decisional independence. In so holding, the Court was building logically on the interpretation of the ALJs' rights under the APA, as enunciated by this Court in *Ramspeck v. Trial Examiners Conf.*, 345 U.S. 128 (1953). It was essential to find that Congress intended to confer a right of action on ALJs (meaning that the complaint, if true, stated claims upon which relief could be granted) in order for the Court to hold, in *Nash I*, that there was a substantial controversy, warranting the issuance of a declaratory judgment, "if the allegations" (*i.e.*, in the complaint) "are true" (App. p. 59a).

In *Ramspeck*, this Court clearly held that ALJs, under the APA, enjoyed independence from agency control or influence with respect to pay, promotion, rotation of cases, and tenure. In *Nash I*, the Second Circuit went further, holding that an ALJ had standing to question agency actions directly affecting decisional independence, such as counseling ALJs outside the normal appellate process. Although that holding was never questioned until several years later (*after* the decision in *Council*), the same Court, in *Nash II*, is now of the opinion that the APA confers on ALJs independence, not in matters pertaining to their quasi-judicial duties, but *only* in matters pertaining to pay, promotion, rotation of cases, and tenure, following *Goodman v. Svahn*, 614 F.Supp. 726 (D.C.D.C. 1985).

After the decision of this Court in *Ramspeck,* and before the decision of the Second Circuit in *Nash I,* there was room for some doubt as to whether the independence of ALJs extended to a substantive right of decisional independence in the performance of their quasi-judicial duties, rather than being limited to independence from adverse agency action with regard to such matters as pay and tenure. However, after *Nash I,* which cited *Ramspeck* as its authority, the substantive right seemed to be secure, and the decision was welcomed by ALJs throughout the nation as giving them a meaningful right of decisional independence. Now, by the decision in *Nash II,* that right has been called into question, if not formally denied. The Court below states that it is not clear whether the APA provides, "expressly or by implication" protection for the decisional independence of ALJs, aside from the tenure, compensation and performance appraisal exemption provisions of the Act (App. p. 8a). Because the case had been decided on the merits by the District Court, the Court of Appeals declined to "assess the legal sufficiency" of petitioner's claims (*Ibid.*). But it was clear enough to the same Court in 1980 that the ALJs' independence under the APA went far beyond such matters as pay and tenure, which are actually of very little importance, compared to independence from agency pressure in the quasi-judicial duties of hearing and deciding cases.

The petitioner submits that the "independence" of ALJs from agency influence is almost meaningless, if confined to matters such as pay and tenure. The reason why Congress removed such matters from agency control was that they were obvious ways in which the agency might retaliate against ALJs who did not decide cases "correctly", that is, as the agency wished them decided. Congress did not specifically say: "No agency shall put

pressure on ALJs to lower their reversal rates", only because the lawful exertion of such pressure was, and is, unthinkable, in the light of the legislative history of the APA.

The intra-circuit conflict has also given rise to at least an apparent conflict between the circuits. The Seventh Circuit, in *D'Amico v. Schweiker,* 698 F.2d 903, 906-907, cited *Nash I* as authority for holding that ALJs had a right of decisional independence going beyond matters of pay and tenure to matters affecting their quasi-judicial duties, but distinguished that case from *Nash I,* holding that the actions complained of did not infringe upon decisional independence. Similarly, the District Court for the District of Columbia cites *Nash I,* together with *Ramspeck* and *Butz v. Economou,* 438 U.S. 478 (1978), as authority, generally, on the question of the independence of ALJs under the APA, in *Ass'n of Administrative Law Judges v. Heckler, (Ass'n of ALJs),* 594 F.Supp. 1132, 1140 (1984). Moreover, that court, by deciding the case on the merits, actually follows *Nash I,* holding by implication that ALJs have a right of action, as well as standing, under the APA, to obtain declaratory relief, if they can prove an infringement of decisional independence in the performance of their quasi-judicial duties. Now, the Second Circuit, in *Nash II,* has cast so much doubt on its prior holding in *Nash I,* that the result is, if not an actual conflict among the circuits, then at least a degree of confusion and uncertainty which would appear to require the settling of the question by this Court.

The petitioner submits that ALJs have the obligation, not merely the right, to protest any infringement upon their decisional independence, in regard to their quasi-judicial duties of hearing and deciding appealed Social Security cases. If they are not totally free in performing such duties, they are not functioning as intended by Congress in passing the APA. The denial of their right of

action to secure their decisional independence adversely affects the functioning of the entire federal administrative justice system. The petitioner submits that the conflict between the two decisions of the Second Circuit raises a federal question of great importance, which has not been, but should be, settled by this Court. The petitioner further submits that the "holding"—not "dictum"—in *Nash I,* should be adopted by this Court, namely, that the APA confers a right of decisional independence on ALJs, giving them not only standing to sue, but also a right of action against, their employing agencies, for declaratory and injunctive relief, when it is alleged that agency action has infringed upon that right.

II. The lower courts erred in granting judgment for respondents with respect to the claim that the ALJs in New Orleans had received oral counseling by agency supervisory personnel, outside the normal appellate process, concerning errors in their decisions in favor of claimants for Social Security benefits (Claim No. 3); therefore, the judgments below should be reversed, and this Court should direct judgment for petitioner on Claim No. 3.

A. Summary

Petitioner's Claim No. 3 involves the counseling of Social Security ALJs, concerning their decisions, reversing initial agency decisions denying Social Security benefits, and granting benefits to claimants. Petitioner submits that the lower courts erred in their decisions on this claim.

The District Court erred most clearly by finding that pressure *had* been exerted on the New Orleans ALJs to lower their reversal rates and then refusing to grant judgment for the plaintiff on that claim. The Court of Appeals erred by holding Rule 52(a) applicable, where there were no disputed questions of fact and where the purported "findings of fact" by the District Court were

actually "conclusions of law." By reason of those errors, both Courts avoided the painful, but necessary, duty of finding that certain agency personnel, even assuming their "benign intent" (App. p. 57a), had, by their objective actions, seriously compromised the integrity of the administrative process. All the petitioner was asking was that those responsible be told of their error through a simple declaratory judgment and that they be told not to do it again.

B. Errors of the District Court[2]

The District Court made no formal findings of fact and conclusions of law. However, the Court's opinion sets forth the basic facts, as to which there was no dispute. The Court stated that the ALJs in the New Orleans office were summoned to the headquarters of the OHA in Arlington, Virginia, where they met individually with CALJ Philip Brown and Irwin A. Friedenberg, a member of the Appeals Council; that Mr. Friedenberg, in the presence of CALJ Brown, discussed with each ALJ a number of the ALJ's decided cases, all of which were favorable to the claimants for Social Security benefits, *i.e.*, "reversals"; that Mr. Friedenberg pointed out errors in the decisions and indicated to each ALJ that the decisions would have been reversed by the Appeals Council, if the Council had reviewed them on its own motion, in the normal appellate process. Three of the four ALJs so counseled (one has died), gave depositions, which were received in evidence, in which they stated that they considered the counseling to be an infringement of their decisional independence, although they would not have objected to Appeals Council review of their cases, on the record, in the normal course of appellate review (App. pp. 21a-22a). The record also shows that the reversal rates of the counseled

[2] See Part C, *infra*, showing how the Court of Appeals compounded the errors by affirming the District Court's judgment.

ALJs were extremely high; that, after they returned to New Orleans, a meeting was called by their ALJIC, Carl Sarett, whose handwritten notes of that meeting are a part of the record; and that, at the latter meeting, ALJIC Sarett admonished the ALJs about their reversal rates (App. p. 80a).

The District Court states:

> "Any attempt by the agency to control the reversal rate of an ALJ would be a clear infringement of decisional independence" (App. p. 28a).

That Court further states:

> "The ALJs in New Orleans *were* subject to significant pressure to lower their reversal rates." (App. p. 29a, emphasis in original).

The petitioner submits that the District Court, having found that significant pressure had been put on the ALJs to lower their reversal rates, was bound to give judgment for the petitioner on Claim No. 3. The decision of the District Court was self-contradictory. It stated the major premise correctly: Any pressure on reversal rates is an infringement of independence. It also stated the minor premise correctly: Pressure to lower their reversal rates was put on the New Orleans ALJs by the agency and the ALJIC. But it then states the direct opposite of the correct conclusion: The pressure on the New Orleans ALJs was not an infringement of their independence.

The District Court further states:

> "In this case, while it is clear that the agency was concerned about reversal rates, the evidence does not support the allegations that ALJs were subject to any direct pressure to maintain a given rate." (App. p. 30a).

But the complaint was not limited to either "direct" pressure or to a "given" or "prescribed" reversal rate. It included, and was so understood by all parties

throughout all the proceedings, "indirect" pressure to "reduce" high reversal rates. By its inaccurate statement, the District Court, in effect, was setting up a "straw man" for easy demolition. The petitioner never argued that respondents imposed a *fixed* reversal rate on all ALJs, but rather that, at the time the events took place, the agency was attempting to get all reversal rates within the limits set by their "Study Report," that is, approximately "50%, + or - 10%." (App. p. 80a).

It should be noted that there was never any dispute as to the basic facts: namely, the meetings in Arlington and New Orleans; the personnel involved; and the counseling itself, concerning reversal decisions only. The District Court's first error was in not deciding the merits on the motion for summary judgment, since only a pure question of law was presented on Claim No. 3, and both the petitioner and the respondents had moved for summary judgment thereon, although at different times. In denying summary judgment, the District Court specified only one factual question, namely, "... defendants' intent, if any, to influence plaintiff's administrative decisions and their success *vel non* regarding such efforts." (App. p. 40a). The petitioner submits, however, that the intention of the counselors is irrelevant, since it is the act of counseling, under the circumstances shown in the record, which constitutes the infringement. The petitioner further submits that the "success *vel non*" of efforts to influence the ALJs' decisions is also irrelevant. The ALJs do not have to have succumbed to the improper efforts to influence their decisions. It is enough that such efforts were made.

In holding that ALJs had not only standing, but also a right of action under the APA, the Court of Appeals, in *Nash I,* relied not only on the legislative history of the APA, as construed in *Ramspeck,* but also on the administrative construction of the Act by the agency itself, as expressed in this case by the Position

Description of the ALJs (App. pp. 55a-56a). That description is also quoted in the District Court's decision as follows:

> "The Social Security and Administrative Procedure Acts prohibit substantive review and supervision of the administrative law judge in the performance of his quasi-judicial functions. His decisions may not be reviewed before publication, and after publication only by the Appeals Council in certain prescribed circumstances. He is subject only to such administrative supervision as may be required in the course of general office management." (App. p. 20a).

In that description, the Secretary concedes the very point of Claim No. 3, namely that the substantive review and counseling by CALJ Brown and Mr. Friedenberg were in violation of both the APA and the Social Security Act.

Finally, the District Court stated: "Although the defendants may have engaged in some questionable practices which clearly caused great unrest among ALJs, it is this Court's finding that they did not infringe on the decisional independence of ALJs" (App. p. 31a). That final holding, which is improperly designated as a "finding" rather than a conclusion of law was directly contradicted by the Court's own "finding" or conclusion about the New Orleans ALJs. It is a conclusion unsupported by substantial evidence on the record as a whole. *Consolidated Edison Co. v. Labor Board,* 305 U.S. 197; *Universal Camera Corp. v. Labor Board,* 340 U.S. 474 (1951). Indeed, it is not only contrary to the record as a whole; it is, the petitioner submits, also clearly erroneous. It should have been rejected by the Court of Appeals and it should now be rejected by this Court.

C. Errors of the Court of Appeals

The petitioner made all of the above arguments in the Court of Appeals, and he submits that that Court erroneously rejected them.

The very first sentence in the opinion in *Nash II* indicates the Court's erroneous view of the issue raised by the appeal. The Court states:

> "The principal issue . . . is whether efforts by the Secretary . . . to improve the quality and efficiency of the work of . . . (ALJs) impaired their asserted right to 'decisional independence' under . . . (the 'APA')" (App. p. 3a).

Petitioner submits that that was not the issue—that was *the defense* interposed by the respondents after the allegedly unlawful actions had been challenged in court. The issue was—and is—whether the specific oral counseling of ALJs, by agency supervisory personnel, outside the normal appellate process, concerning their reversal decisions—was an infringement of decisional independence. In this connection, it should be noted that there is no talk about "improving quality and efficiency," in the inter-office memorandums to the Commissioner of Social Security from his Associate Commissioner for Hearings and Appeals. In those memorandums, which were not intended for publication, there is specific talk about "lowering reversal rates" (App. p. 79a).

However, the chief error of the Court of Appeals, in *Nash II,* was its use of the "clearly erroneous" standard of review set forth in Rule 52(a) of the Federal Rules of Civil Procedure (App. p. 77a). The Court states:

> "Because the district court's factual findings underlying the conclusion that the Secretary's policies did not exceed the boundaries of legitimate agency supervision are fairly supported by the record and therefore are not clearly erroneous, we agree with the district court that the Secretary's practices did not infringe on the decisional independence of ALJs" (App. p. 3a).

The Court further states:

> "The district court explicitly determined that 'although the defendants may have engaged in some questionable practices which clearly caused great unrest among ALJs . . . they did not infringe on the decisional independence of ALJs.' The factual components of this conclusion, as with all findings of fact, cannot be set aside on appeal unless they are clearly erroneous. Fed. R. Civ. P. 52(a)" (App. p. 11a).

But the Court did not specify the "factual findings" that were referred to in the first quotation above and that supposedly underlay the conclusion that the Secretary's policies and practices—with respect to the counseling of high-reversing ALJs about their reversal decisions—did not infringe on the decisional independence of ALJs; nor did the Court specify the "factual components" in the second quotation. Such "factual findings" or "factual components" could not be specified, because there were none. Only "intent" is mentioned (App. p. 11a), which is irrelevant. But there is no dispute as to the actual facts, the basic facts, nor is there any intimation anywhere that the credibility of any witness was involved. Moreover, the Court of Appeals, itself, correctly designates as a "conclusion" the District Court's determination that the practices (*i.e.*, the counseling) did not infringe decisional independence (App. p. 11a), which the District Court had incorrectly designated as a "finding" (App. p. 31a).

By mistakenly believing that the District Court had decided basic facts—contested facts—rather than a pure question of law on admitted facts, the Court of Appeals was led to its unfortunate error of affirming a clearly erroneous decision of the District Court on the question of law. This Court should now correct the errors of both the lower courts.

III. The Petitioner, an ALJ, has standing to challenge the legality of the Secretary's "Rulings of Non-Acquiescence."

Claim No. 8 involves the purported right of the Secretary not to follow, as precedents, specific decisions of United States District Courts and Courts of Appeals with which he disagrees, even within the territorial jurisdictional limits of such courts, by publishing Social Security "Rulings of Non-Acquiescence" in such cases, which rulings purport to be binding on ALJs.

The legality of the Secretary's Rulings of Non-Acquiescence has been considered in several cases. *Ithaca College v. NLRB,* 623 F.2d 224 (2nd Cir.), *cert. denied,* 449 U.S. 975; *Kirkland v. Railroad Retirement Board,* 706 F.2d 99 (2nd Cir. 1983). It was examined in depth in *Stieberger v. Heckler,* 615 F. Supp. 1315, 1351-1367, where the District Court granted a preliminary injunction against the continuation of the policy (*ibid.,* p. 1400). The injunction was vacated in *Stieberger v. Bowen,* 801 F.2d 29 (2nd Cir. 1986), since it was deemed temporarily unjustified in the light of *Schisler v. Heckler,* 787 F.2d 76 (2nd Cir. 1986). The District Court's opinion points out that "Although not specifically dealt with by the Supreme Court, the SSA's non-acquiescence policy has been the subject of almost universal condemnation by those courts which have considered its legality" (615 F. Supp. 1315, 1353), and the Court proceeds to discuss cases from the Second, Fourth, Sixth, Eighth, Ninth and Tenth Circuits. The District Court stated:

> "... It (the SSA) has frustrated congressional intent, by virtue of the agency's persistent failure to apply the law in accordance with this intent as interpreted by the federal appellate courts in accordance with *Marbury* (i.e. *Marbury v. Madison,* 5 U.S. (1 Cranch) 137). It even has placed its own ALJs in the untenable position of 'trying to serve two masters' ... the courts, who interpret the

> Constitution and laws which ALJs are sworn to uphold; and the Secretary, who has essentially instructed ALJs that they may disregard such interpretations in favor of her own. That these consequences reflect a serious departure from any reasonable conception of an orderly system of justice simply cannot be gainsaid" (615 F. Supp. 1315, 1367).

In this very case, when Claim No. 8 was filed, in 1982, petitioner's office was faced with a situation where the District Court (Judge Elfvin) had remanded a case to the ALJ for further proceedings, based on the Second Circuit's holding in *Campbell v. Secretary of Health and Human Services,* 665 F.2d 48 (2nd Cir. 1981), and the Secretary had issued a Ruling of Non-Acquiescence in *Campbell*, directing ALJs not to follow the holding.[3] This placed the ALJ in an impossible position: he must disobey either the Court or the Secretary (See also *Ass'n of ALJs v. Heckler,* 594 F. Supp. 1132, 1142, Footnote 14).

Such rulings, when applied to ALJs, are also in violation of the Position Description[4] of the ALJs, where the following appears:

> "*Supervision and Guidance*
>
> . . . (His i.e., the ALJ's) decisions take into account all applicable Federal, State, and foreign laws, statutes, regulations, rulings, *and decisions of the Federal Courts. . . .*" (Emphasis supplied).

The court below also erred in stating that the only adverse consequence to an ALJ resulting from the non-acquiescence policy "is that his decisions are subject to

[3] The Second Circuit's decision was reversed by this Court, *Heckler v. Campbell,* 461 U.S. 458 (1983), but petitioner submits that, until then, the Second Circuit's decision was the law in Buffalo, New York, which is within the territorial limits of that Circuit.

[4] The full text of the Position Description is set forth as the Appendix to *Ass'n of ALJs v. Heckler,* 594 F. Supp. 1132, 1144-1147.

reversal by the Secretary" (App. p. 6a). However, a ruling operates so as to prevent the ALJ from issuing a decision contrary to the Secretary's view, which is clearly an infringement of decisional independence.

Petitioner submits (1) that the Secretary has no right of non-acquiescence, but must follow, as precedents, all decisions of the district and appellate federal courts within their respective jurisdictions; and (2) that the application of such rulings to ALJs is in violation of (a) the APA; and (b) the Secretary's own administrative construction of the APA and the Social Security Act, as embodied in the ALJs' Position Description. It was error for the Courts below to hold that the petitioner, an ALJ, lacked standing to challenge the legality of such rulings, and this Court should reverse their decisions. Since only a pure question of law is involved, this Court should also decide the question on the merits.

IV. The public interest will be served by an authoritative statement as to the respective rights of the parties.

The opinion of the Second Circuit in *Nash I* closes with the following remark:

> "By providing an authoritative delineation of the respective rights and powers of the parties to this litigation, and by recognizing that good administration must not encroach upon adjudicative independence, the district court on remand will have the opportunity to advance the principal goal of judicial and quasi-judicial administration: reduction of delay without compromise to the demands of due process, of which judicial independence is but one, important part" (App. p. 60a).

Petitioner submits that neither the district court nor the Second Circuit in *Nash II* provided an authoritative delineation of the rights of the parties; and that the

public interest will now be served if this Court takes the opportunity to do so by issuing the writ prayed for in this proceeding.

This Court has never considered the questions raised herein. In *Ramspeck*, this Court considered the legality of regulations adopted by the Civil Service Commission to implement the provisions of the APA; and, in *Butz*, this Court considered the immunity of ALJs from civil liability for actions taken in the performance of their official duties. But this Court has never considered the extent of an ALJ's right to resist agency pressure with respect to the performance of his quasi-judicial duties; in fact, it has never formally held that such a right exists.

The lower courts have considered both the existence and the extent of such a right, as shown above. All of their decisions pay lip service to the principles set forth in *Ramspeck* and *Butz*, but all of them—except *Nash I*—have been decided against the ALJs, who, in effect, are again relegated therein to the status of mere employees, with no enforceable right to "decisional independence", a term placed in quotation marks to indicate that it is either non-existent or greatly exaggerated (App. pp. 3a, 6a, 15a). The line of cases includes *Ass'n of ALJs*, *D'Amico*, and *Goodman*, and it culminates in *Nash II*, which, not content with affirming on the merits, strives for overkill—by (a) taking away the right of an ALJ (granted in *Nash I*) to question direct agency pressure to influence ALJ decisions; and (b) by applying *res judicata* to petitioner's case, because of the *Ass'n of ALJs* case (App. pp. 8a-10a).[5] Against that line

[5] The Bellmon Amendment required the Appeals Council to resume its discontinued practice of reviewing ALJ *decisions* on its own motion. The Association of ALJs attacked the implementation of the amendment, on the ground that the Appeals Council was not reviewing *cases* (decisions), but was rather reviewing *judges*: that is, high-reversing ALJs were "targeted" for 100% review of their cases. The Court of Appeals states: "The point is that the Bellmon Review Program is ... the same as the 'Quality Assurance System'

(Footnote continued on following page.)

of cases, which demeans the ALJs and denigrates their position, stands the decision in *Nash I,* which, prior to *Nash II,* was the solid basis on which the ALJs rested their claim of decisional independence.

This Court now has the opportunity to rule on these important questions and to state which line of cases is correct—the line upholding the ALJs' independence, ending with *Nash I,* or the line denying that independence, ending with *Nash II.* The opportunity is not likely to present itself again in the foreseeable future, due partly to the prohibitive cost of litigation, but due also to the fact that there is a "chilling effect" now felt by the ALJs, as a result of the cold winds blowing from the lower courts.

It is also important, in our democratic society, that the Government not only do justice, but that it be perceived as doing so. While this case was pending in the Court of Appeals, two articles appeared in *The New York Times,* relative to agency pressure on Social Security ALJs with respect to their reversals of initial agency decisions denying benefits to claimants (App. p. 83a, p. 85a).[6] Those articles indicate that there is considerable

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(Footnote continued from preceding page.)

considered herein" (App. p. 10a). That statement is erroneous. The Bellmon Review was (a) review *by the Appeals Council,* in accordance with regulations; and (b) the counseling projected under Bellmon never took place. In the instant case, the "review" was off the record, *not* by the Appeals Council, but by management personnel; and (b) the counseling actually took place. Hence, the issues were different in the two cases, and, since petitioner was not a party to the *Ass'n of ALJs* case, neither *res judicata* nor collateral estoppel (issue preclusion) applies. Even if either doctrine applied, petitioner submits that a "day in court", under modern law, includes the right of appeal, so petitioner should be accorded that right in his own case (this proceeding), since he did not have it in the *Ass'n of ALJs* case, as a practical matter.

[6] Neither article mentions this litigation, and petitioner had no advance knowledge that such articles would appear.

doubt in the community as to the integrity of Social Security appeals procedures. This Court has the opportunity, in this proceeding, to dispel such doubt by a forceful repudiation of the decisions below.

The Secretary's policy of Non-Acquiescence was also the subject of a similar article in 1984 (App. p. 87a). This Court now has the opportunity to reaffirm the principle of judicial supremacy, which has been the foundation of our jurisprudence ever since the decision in *Marbury v. Madison.*

With *Nash II* taking away the right given to ALJs in *Nash I,* we have come to a fork in the road of Anglo-American jurisprudence. The direction taken will seriously affect the ALJs—not only the Social Security ALJs, but all ALJs in the federal service. The vast majority are deeply discouraged by the decision in *Nash II,* and they are watching with great interest to see which road this Court will take—whether it will be the road of *Nash II,* with its denial of any judicial remedy to enforce the intent of Congress to insulate ALJs from agency interference in the performance of their quasi-judicial duties—or whether it will be the road of *Nash I,* with its logically and juridically sound holding, namely, that the APA, by clear implication, confers on ALJs a right of decisional independence, which may be enforced through court action for declaratory and injunctive relief, whenever agency action infringes on that right.

Conclusion

For the foregoing reasons, the petitioner respectfully prays that a writ of certiorari issue to the Court of Appeals for the Second Circuit to review the questions presented herein.

Buffalo, New York
May 25, 1989

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit, dated March 7, 1989 (*Nash II*)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 586—August Term, 1988

(Argued: December 20, 1988 Decided: March 7, 1989)

Docket No. 88-6066

SIMON NASH,

Plaintiff-Appellant,

—v.—

OTIS R. BOWEN, JOHN A. SVAHN, DONALD J. DEVINE, LOUIS B. HAYS, PHILIP T. BROWN, and L. CHARLES LEONARD,

Defendants-Appellees.

Before:

FEINBERG, NEWMAN and ALTIMARI,

Circuit Judges.

Appeal from a judgment finding that the Secretary of Health and Human Services had not infringed upon the "decisional independence" of plaintiff-appellant, and from summary judgment in favor of defendants-appellees

for lack of standing to challenge Secretary's policy of non-acquiescence, entered in the United States District Court for the Western District of New York (John T. Elfvin, *Senior Judge*).

Affirmed.

SIMON NASH, Buffalo, New York, *plaintiff-appellant pro se.*

STEPHEN J. MARKMAN, Ass't Attorney General, Washington, D.C. (Wilfred R. Caron, Senior Counsel, William G. Laffer III, Office of Legal Policy, U.S. Dep't of Justice, Washington, D.C., of counsel), *for defendants-appellees.*

Irving Kator, Joseph B. Scott, Jennifer R. Levin, Kator, Scott & Heller, Washington, D.C., *for Federal Administrative Law Judges Conference and Association of Administrative Law Judges, Amici Curiae, on behalf of plaintiff-appellant.*

Anthony Szczygiel, Ass't Professor, Legal Assistance Program, State University of New York at Buffalo Law School, Buffalo, New York, *Amicus Curiae on behalf of plaintiff-appellant.*

ALTIMARI, *Circuit Judge*:

The principal issue raised by the instant appeal following a nonjury trial in the United States District Court for the Western District of New York (Elfvin, *J.*) is whether efforts by the Secretary of Health and Human Services (the "Secretary") to improve the quality and efficiency of the work of Administrative Law Judges ("ALJs") impaired their asserted right to "decisional independence" under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (the "APA"). In addition, we are asked to decide whether plaintiff-appellant, an ALJ with the Social Security Administration, has standing to challenge the Secretary's policy of non-acquiescence in decisions of federal courts other than the Supreme Court. Because the district court's factual findings underlying the conclusion that the Secretary's policies did not exceed the bounds of legitimate agency supervision are fairly supported by the record and therefore are not clearly erroneous, we agree with the district court that the Secretary's practices did not infringe on the decisional independence of ALJs. We also find that the district court correctly granted summary judgment in favor of defendants-appellees on plaintiff-appellant's non-acquiescence claim for lack of standing and therefore affirm the district court's judgment in all respects.

BACKGROUND

Plaintiff-appellant, *pro se*, Simon Nash is an Administrative Law Judge ("ALJ") with some thirty years experience in the Social Security Administration. In 1967, he became an ALJ in charge ("ALJIC") of the Buffalo, New York field office of hearings and appeals. By 1975, the Social Security Administration (the "agency") was faced

with an administrative crisis due to a backlog of over 100,000 cases. In order to eliminate the backlog and the concomitant delays in processing appeals, former director of the Bureau (now "Office") of Hearings and Appeals Robert L. Trachtenberg instituted a series of reforms which appellant contends interfered with the "decisional independence" of ALJs under the APA, the Social Security Act and the due process clause of the fifth amendment. Nash initially protested the new policies within the agency only to be summarily demoted from his position as ALJIC to ALJ. In his original complaint filed May 30, 1978 in the district court, plaintiff alleged, in addition to a claim concerning his demotion which was later dropped, that the Secretary's newly-instituted "Peer Review Program," monthly production goals, and "Quality Assurance System" infringed upon the "quasi-judicial" status of ALJs. *Nash v. Califano*, 613 F.2d 10, 13 (2d Cir. 1980) ("*Nash I*"); *see Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 130 (1953).

On June 4, 1979, plaintiff's claims were dismissed by the district court for lack of standing. This court reversed on January 7, 1980 in an opinion by then Chief Judge Kaufman, *Nash I*, 613 F.2d 10, and remanded the case to the district court for further consideration. We held that the "alleged inroads on ALJs' decisional independence [was] arguably within the zone of interests protected by the [APA] and Social Security Act." *Id.* at 14; *see Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). This court also noted in *dicta* that the APA confers a "special status" on ALJs, protecting them from agency interference and giving them a "qualified right" of decisional independence. 613 F.2d at 15-16; *see Ramspeck*, 345 U.S. at 132-33.

Following remand to the district court, plaintiff filed an amended complaint, dated September 29, 1982, which realleged the above claims seeking declaratory relief and added a new claim which attacked the legality of the agency's non-acquiescence policy. On May 29, 1985, the district court dismissed plaintiff's non-acquiescence claim for lack of standing and set the remaining claims for trial. At that time, the district court also considered defendants' contention that this court's decision in *Nash I*—while resolving the question of plaintiff's standing to maintain his remaining claims under the APA—did not preclude dismissal of those claims inasmuch as neither the APA nor any other federal statute expressly or impliedly creates a private right of action in plaintiff's favor. The district court rejected this argument and instead interpreted *Nash I* as construing the APA to provide plaintiff a right of action to advance his decisional independence claims. *But see Goodman v. Svahn*, 614 F. Supp. 726, 729 n.3 (D.D.C. 1985); *cf. Association of ALJs, Inc. v. Heckler*, 594 F. Supp. 1132, 1140-41 (D.D.C. 1984). The case thus proceeded to trial before Judge Elfvin in 1985-86, and following trial the matter was submitted for decision. On January 6, 1988, the district court filed its memorandum decision and order finding in favor of defendants, and judgment thereafter was entered dismissing all of plaintiff's claims.

DISCUSSION

I.

We address plaintiff's non-acquiescence claim first. As the district court correctly recognized, plaintiff was unable to demonstrate the requisite " 'distinct and palpable' " injury, *Gladstone, Realtors v. Village of Bellwood*, 441

U.S. 91, 100 (1979) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)), arising from the challenged practice such that he "personally would benefit in a tangible way from the court's intervention." *Warth*, 422 U.S. at 508; *see Allen v. Wright*, 468 U.S. 737 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). The only adverse consequence for Nash resulting from non-acquiescence is that his decisions are subject to reversal by the Secretary. This court previously has considered the Secretary's *de facto* policy of non-acquiescence in the law of the circuit concerning the "treating physician" rule, but only in the context of adjudicating the rights of *claimants* to Social Security benefits. *See, e.g., Stieberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986); *Schisler v. Heckler*, 787 F.2d 76 (2d Cir. 1986). At least one other circuit court has rejected ALJ standing to challenge the merits of a policy instruction to ALJs when a claimant-initiated proceeding seeking review of the administrative denial of social security benefits is available. *See D'Amico v. Schweiker*, 698 F.2d 903, 906 (7th Cir. 1983). Indeed, "[t]hat route is preferable to a suit by administrative law judges, who are the umpires between claimants to social security benefits and the Social Security Administration." *Id.* We thus agree with the district court that Nash lacks standing to pursue a non-acquiescence claim against the Secretary.

II.

Turning, then, to plaintiff's "decisional independence" claims, the challenged practices are threefold. As explained in *Nash I*, familiarity with which is assumed, the first allegedly unlawful practice is the "Peer Review Program," (a/k/a the "Appellate Appraisal System") which

directed the Office of Hearings and Appeals to review decisions of ALJs outside of the usual appeals procedure conducted by the Appeals Council. 42 U.S.C. §§ 405, 421; 20 C.F.R § 404.900 *et seq.*; *cf.* 5 U.S.C. §§ 556(b)(3), 3105 (vesting ALJs with power to conduct administrative hearings). The second practice concerns the imposition of allegedly arbitrary monthly production quotas requiring ALJs to render a specified number of decisions per month. *Cf.* 5 U.S.C. § 4301(2)(D) (exempting ALJs from performance appraisals); 5 C.F.R. § 930.211 (same). The third alleged threat to ALJs' decisional independence is the "Quality Assurance System," which attempted to control the number of ALJ decisions reversing previous state-level determinations declining to award benefits. *See generally Nash I*, 613 F.2d at 13.

A.

Preliminarily, we address two procedural arguments raised by defendants on this appeal. According to defendants, plaintiff's generalized attacks on the agency are "fundamental[ly] flaw[ed]" in that they do not state a cause of action under the APA or any other federal statute. Defendants point to the D.C. Circuit's in banc decision in *Council of and for the Blind of Delaware County Valley, Inc. v. Regan*, 709 F.2d 1521, 1524-25 (D.C. Cir. 1983) as support for the proposition that although we previously have decided in favor of plaintiff on the question of standing, *Nash I*, 613 F.2d at 16-17, this court is not thereby precluded now from holding that plaintiff has no private right of action to maintain his suit. *Cf. Goodman v. Svahn*, 614 F. Supp. 726, 729 n.3 (D.D.C. 1985). Relying on *dicta* from *Nash I* that the APA "confer[s] a qualified right of decisional independence upon ALJs," 613 F.2d at 15, the district court declined to examine the suffi-

ciency of Nash's claims and proceeded directly to the merits. Defendants in effect argue that the district court was not bound by *dicta* in *Nash I* and should have dismissed plaintiff's causes of action for failure to state claims upon which relief could be granted. *See* Fed. R. Civ. P. 12(b)(6).

While we agree *Nash I* stands only for the narrow premise that plaintiff has standing to pursue his claims, we see no need to decide in this case whether the APA confers, expressly or by implication, protection for the decisional independence of ALJs since the district court rejected Nash's claims on their merits. We should add, however, that it is not clear whether the APA provides such protection aside from the tenure, compensation, and performance appraisal exemption provisions under the APA that give life to the "quasi-judicial" status of ALJs. *See Goodman*, 614 F. Supp. at 728; *cf.* 5 U.S.C. § 7521(a) (protecting ALJs from agency disciplinary action except for "good cause established and determined by the Merit Systems Protection Board . . . after opportunity for hearing before the Board"); *id.* § 1205(a)(1) (empowering Merit Systems Protection Board to hear and adjudicate disputes under APA, including whether an ALJ has been subjected to "prohibited personnel practice" under 5 U.S.C. § 1206(a)(1)); *Brennan v. HHS*, 787 F.2d 1559 (Fed. Cir.), *cert. denied*, 479 U.S. 985 (1986) (adjudicating ALJ decisional independence claim in context of appeal from decision of Merit Systems Protection Board disciplining ALJ under 5 U.S.C. § 7521). In any event, given the present posture of this case, we decline to assess the legal sufficiency of Nash's claims.

Defendants' other procedural objection concerns the preclusive effect of a prior judgment in favor of the Secretary in *Association of ALJs v. Heckler*, 594 F. Supp. 1132

(D.D.C. 1984). The Department of Justice contends that the *Association* case is *res judicata* on the merits of at least two of Nash's decisional independence claims. The complaint in the *Association* case constituted a broad challenge to various practices of the Secretary substantially identical to those advanced by plaintiff in this case. The Association specifically alleged that the Secretary had infringed upon the decisional independence of ALJs through policies and practices designed to monitor the decisions of ALJs and "pressure [them] into disposing of . . . larger numbers of cases each year" and "into deciding fewer cases in favor of claimants." Complaint ¶ 18; *see* 594 F. Supp. at 1135-36. The record in this case indicates that Nash is a member of the Association, that he consulted with the Association's counsel about the D.C. district court litigation, and that he shared certain documents with the Association for use in its case. App. at 437-39.

We are inclined, therefore, to agree with defendants that the decision of the district court, at least with regard to the "Peer Review Program" and the "Quality Assurance System," may be affirmed as *res judicata* on the judgment in *Association of ALJs v. Heckler*. Although the district court did not rule on this point, it would seem that we are not precluded from doing so. *See American Furniture Co. v. International Accommodations Supply*, 721 F.2d 478, 482 (5th Cir. Unit A 1981); *Robertson v. Interstate Securities Co.*, 435 F.2d 784, 787 n.4 (8th Cir. 1971); *see also Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970); *but cf. Savings & Profit Sharing Fund of Sears Employees v. Gago*, 717 F.2d 1038, 1039 n.3 (7th Cir. 1983) (unless pleaded or otherwise properly raised at trial, *res judicata* defense is waived); *Nevada Power Co. v. Watt*, 711 F.2d 913, 932-33 (10th Cir. 1983) (same).

On the question of *res judicata*, plaintiff argues only that his claims are separate and distinct from those decided in *Association of ALJs*. He attempts to couch the decisional independence claims raised by the *Association* case in terms of the now-discontinued "Bellmon Review Program," which was instituted under the authority of section 304(g) (the "Bellmon Amendment") of the Social Security Disability Amendments Act of 1980, Pub. L. No. 96-265, 94 Stat. 441, 456 (1980). *See Association of ALJs*, 594 F. Supp. at 1133; *see also W.C. v. Bowen*, 807 F.2d 1502, 1503-05 (9th Cir. 1987) (explaining reasons for demise of "Bellmon Review Program"), *modified*, 819 F.2d 237 (9th Cir. 1987). However, the fact that the "Bellmon Review Program" is no longer in existence does not make the legal issue moot. *See Association of ALJs*, 594 F. Supp. at 1141. Indeed, the challenged practices in *this* case also appear to have ceased; but because they are "capable of repetition, yet evading review," *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911), there remains a live controversy between the parties to be resolved. *See Murphy v. Hunt*, 455 U.S. 478, 481 (1982). The point is that the "Bellmon Review Program" is for all intents and purposes the same as the "Quality Assurance System" considered herein, *i.e.*, the targeting and pressuring of ALJs with high allowance of benefit rates (a/k/a "reversal" rates) to fall into line or be subjected to disciplinary action. Plaintiff's other claims were either raised in the *Association* case ("Peer Review Program" claim), or could have been raised (monthly production goals claim) in that action. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980). In sum, Nash appears to have had a full and fair opportunity to be heard in that case.

Notwithstanding the very substantial, if not dispositive, arguments in favor of application of the rule of *res judi-*

cata in the instant case, we nonetheless feel obliged to reach the merits of Nash's claims in view of our strong intimation in *Nash I* that plaintiff was entitled to a plenary trial. 613 F.2d at 17. Accordingly, we proceed to a consideration of the dismissal by the district court of plaintiff's decisional independence claims on their merits.

B.

The district court explicitly determined that "[a]lthough the defendants may have engaged in some questionable practices which clearly caused great unrest among ALJs, . . . they did not infringe on the decisional independence of ALJs." The factual components of this conclusion, as with all findings of fact, cannot be set aside on appeal unless they are clearly erroneous. Fed. R. Civ. P. 52(a).

The district court held that the "Peer Review Program" was intended to respond to the "wide disparity in legal and factual determinations among ALJs." Judge Elfvin concluded that various peer review actions constituted "legitimate administrative steps undertaken to enhance the quality and efficiency of the hearing system." *Cf. Heckler v. Campbell*, 461 U.S. 458, 466-67 (1983). Policies designed to insure a reasonable degree of uniformity among ALJ decisions are not only within the bounds of legitimate agency supervision but are to be encouraged. *See Santise v. Schweiker*, 676 F.2d 925, 930-31 (3d Cir. 1982), *cert. denied*, 461 U.S. 911 (1983); *see generally* Scalia, *The ALJ Fiasco—A Reprise*, 47 U. Chi. L. Rev. 57 (1979). In this case, "extra-appellate" review of "dead" cases aimed at improving the quality of ALJ decisionmaking is entirely consistent with the prerogative of the agency which retains "all the powers which it would have in making the initial decision." 5 U.S.C. § 557(b). It is, after all, the Secretary who ultimately is authorized to make final

decisions in benefit cases. *Baker v. Heckler*, 730 F.2d 1147, 1150 (8th Cir. 1984); *cf.* 42 U.S.C. § 405(1) (authorizing Secretary to delegate *his* statutory powers to "any member, officer, or employee" of the agency). An ALJ is a creature of statute and, as such, is subordinate to the Secretary in matters of policy and interpretation of law. *Mullen v. Bowen*, 800 F.2d 535, 540-41 n.5 (6th Cir. 1986); *Association of ALJs*, 594 F. Supp. at 1141. Thus, the Secretary's efforts through peer review to ensure that ALJ decisions conformed with his interpretation of relevant law and policy were permissible so long as such efforts did not directly interfere with "live" decisions (unless in accordance with the usual administrative review performed by the Appeals Council). *See* 5 U.S.C. § 556(b) (administrative hearings "shall be conducted in an impartial manner"); *id.* § 554(d)(2) (ALJ shall not be "subject to . . . supervision or direction" concerning pending matters). The efforts complained of in this case for promoting quality and efficiency do not infringe upon ALJs' decisional independence. Since Judge Elfvin concluded that the "Peer Review Program" was intended to be, and operated as, a quality control measure, we see no reason to disturb his determination.

Regarding the Secretary's policy of setting a minimum number of dispositions an ALJ must decide in a month, we agree with the district court that reasonable efforts to increase the production levels of ALJs are not an infringement of decisional independence. In a memorandum dated July 1, 1975, then Director Trachtenberg indicated that while he was opposed to the fixing of *quotas*, he was recommending a *goal* of 26 dispositions per four-week period. When Louis B. Hays became Associate Commissioner of the Office of Hearings and Appeals in 1981, he specifically concerned himself with ALJs whose produc-

tivity fell below twenty case dispositions per month. The record also reflects continuing pressure from the agency on ALJs to increase monthly dispositions.

The setting of reasonable production goals, as opposed to fixed quotas, is not in itself a violation of the APA. The district court explicitly found that the numbers at issue constituted reasonable goals as opposed to unreasonable quotas. Judge Elfvin explained that

> [a] minimum number of dispositions an ALJ must decide in a given period, provided this number is reasonable and not "etched in stone", is not a prescription of how, or how quickly, an ALJ should decide a particular case. It does not dictate the content of the decision.

Moreover, in view of the significant backlog of cases, it was not unreasonable to expect ALJs to perform at minimally acceptable levels of efficiency. Simple fairness to claimants awaiting benefits required no less. Accordingly, we agree with the district court that the decisional independence of ALJs was not in any way usurped by the Secretary's setting of monthly production goals.

The Secretary's "reversal" rate policy embodied in the "Quality Assurance System," however, is cause for concern. To coerce ALJs into lowering reversal rates—that is, into deciding more cases against claimants—would, if shown, constitute in the district court's words "a clear infringement of decisional independence." *See also Schweiker v. McClure*, 456 U.S. 188, 195 (1982). In his brief on appeal and at oral argument, Nash characterized the alleged pressure from the agency concerning reversal rates as the heart of the controversy. Plaintiff also maintained that the reversal rate policy, in effect from approximately 1975 to 1985, was implemented under the guise of improv-

ing the quality and uniformity of ALJ decisions but was in fact a clear attempt by the Secretary to influence ALJs into deciding more cases in favor of the agency.

The Secretary concedes that he was very concerned about reversal rates, but only to the extent that they might indicate errors in the decisionmaking of ALJs. Testimony in the record revealed that reversal rates were used as a benchmark in deciding whether there *might* be problems in the adjudicatory methods of particularly high (or low) reversal rate ALJs. Statistical record evidence supported the agency's proffered correlation between actual errors of law or policy in ALJs decisions and extremes in their reversal rates. The agency maintained then, and maintains now, that reducing reversal rates was not the intent of the policy. Indeed, a handwritten notation by Associate Commissioner Hays on a 1982 internal agency memorandum placed the policy in perspective:

> [T]here is *no* goal to reduce reversal rates—there is a goal to improve decisional quality [and] consistency, which is assumed to have as one effect a reduction of the reversal rate.

App. at 2071.

In view of the foregoing record evidence, therefore, we cannot say that the district court's determination was clearly erroneous. Whatever legitimate concerns there may be about the soundness of the Secretary's practices regarding "reversal" rates, those concerns are more appropriately addressed by Congress or by courts through the usual channels of judicial review in Social Security cases. *See generally* Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455, 499-500 (1986). The bottom line in this case is that it was entirely within the Secretary's discretion to adopt rea-

sonable administrative measures in order to improve the decisionmaking process. *See Heckler v. Campbell*, 461 U.S. 458, 466 (1983) (" 'exceptionally broad' " authority is vested by Congress in Secretary to implement and administer Social Security Act) (quoting *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981)); *see also* 42 U.S.C. § 405(a), (b). Since the district court found no direct pressure on ALJs to maintain a fixed percentage of reversals, we conclude that the Secretary's policy in this regard did not infringe upon the "decisional independence" of ALJs.

CONCLUSION

For all of the foregoing reasons, the judgment of the district court is

Affirmed.

APPENDIX B

Memorandum and Order of the United States District Court for the Western District of New York, dated December 31, 1987, and Judgment Dismissing Causes of Action, dated January 7, 1988

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-78-281E

SIMON NASH,

Plaintiff,

vs.

OTIS R. BOWEN,[1] JOHN A. SVAHN, DONALD J. DEVINE, LOUIS B. HAYS, PHILIP T. BROWN and L. CHARLES LEONARD,

Defendants.

MEMORANDUM AND ORDER

The plaintiff, an Administrative Law Judge ("ALJ") with the Bureau of Hearings and Appeals ("BHA") in the Social Security Administration, brought this action seeking declaratory and injunctive relief as to eight practices or proposals, planned or engaged in by the defendants, that allegedly interfere with his decisional independence in violation of the Administrative Procedure Act ("the APA"), 5 U.S.C. §§551 *et seq.*

In his Second Amended Complaint the plaintiff alleges that the defendants are attempting to infringe on his decisional independence as an ALJ by (1) reviewing the

[1] The designation of the defendant has been changed pursuant to rule 25(d) of the Federal Rules of Civil Procedure.

decisions of ALJs outside of the usual appeals procedure of case review by the Appeals Council (called the "Appellate Appraisal System" or "Peer Review Program"), (2) imposing arbitrary production quotas for the number of cases each ALJ must decide each month, (3) mandating a uniform "reversal rate" for ALJs, (4) relegating judicial duties of ALJs to clerical and management personnel in the "Office Reconfiguration Plan," (5) delegating to agency personnel, other than ALJs, the authority to conduct hearings and preside at the taking of evidence, (6) combining managerial and supervisory responsibilities with judicial duties in the positions of "Chief ALJ" and "Regional Chief ALJ," which combination is inconsistent, (7) publishing "Program Policy Statements" which purport to be binding on ALJs and provide detailed accounts of what constitutes evidence of disability in typical cases and (8) publishing "Social Security Rulings of Non-Acquiescence" which orders ALJs not to follow certain decisions of United States District Courts or of United States Courts of Appeals in making their determinations.[2]

The defendants had prevailed initially in this Court on their assertion that the plaintiff lacked standing to press these claims. However, the United States Court of Appeals for the Second Circuit in *Nash v. Califano*, 613 F.2d 10 (1980), proclaimed the propriety of this action by the plaintiff and his right to a declaratory judgment if his allegations were proven to be true. "The express prohibitions of performance evaluations and substantive review contained in 5 U.S.C. §4301, and appellant's

[2] Respectively, these allegations—which have loosely been referred to as independent causes of action—are set forth in paragraphs 21 through 28 of the Second Amended Complaint as current "unlawful practices."

position description promulgated by the Bureau of Hearings and Appeals, give his injury the required direct impact upon statutorily created rights." *Id.* at 17.

The appellate court, however, did concur with this Court's holding that the plaintiff lacked standing with respect to those claims denominated in the Second Amended Complaint as claims five, six, and eight. *Ibid.* By joint stipulation of the parties claims four and seven were dismissed prior to trial, leaving three claims to be decided here—to wit, (1) the review of ALJ decisions outside the usual Appeals Council procedure, (2) the imposition of production quotas on ALJs and (3) the attempt to mandate a uniform reversal rate for the ALJ corps.[3]

An ALJ—a position created by statute—assists, in this case, the Secretary of Health, Education and Welfare in the performance of his Congressionally mandated duties. Under Titles II and XVI of the Social Security Act, 42 U.S.C. §401 *et seq.* and 42 U.S.C. §1381 *et seq.*, an ALJ in the BHA conducts a *de novo* review of claims for Social Security benefits, primarily applications for disability insurance, that have been denied on the state agency level, a previous stage of the administrative process. The Secretary delegates his authority to ALJs to conduct the review of claims that have been denied, and to "reverse" such denials where warranted.

An ALJ, as originally conceived, was an employee of the agency for whom he was conducting the hearings and was completely under such agency's jurisdiction. *See Rampspeck v. Trial Examiners Conf.*, 345 U.S. 128, 130 (1953). The dependent status of the hearing examiner, as

[3] Respectively, paragraphs 21, 22 and 23 of the Second Amended Complaint.

ALJs were formerly known,[4] came to be perceived as problematic. Hearing examiners were seen to be "mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations." *Id.* at 131. Congress, in enacting the APA, sought to redress the impression of bias in hearing examiners' decisions by removing decisions concerning compensation, promotion and tenure from the jurisdiction of the employing agency and vesting them instead in the Civil Service Commission (today known as the Office of Personnel Management). In this way they would be released from any pressure to render their decisions in a particular way in order to preserve their jobs or salaries.

Today, an ALJ appointed under 5 U.S.C. §3105, is not considered an employee for the purposes of tenure and is not subject to a performance review. 5 U.S.C. §4301(2)(D). Pay increases for an ALJ are not conditioned on the agency's determination of the level or quality of his[5] work product. 5 U.S.C. §5335. Instead, an ALJ is "entitled to pay prescribed by the Office of Personnel Management independently of agency recommendations or ratings ***." 5 U.S.C. §5372. An agency may take punitive action against an ALJ only for "good cause" the existence *vel non* of which is not determined by the agency but by the Merit Systems Protection Board. The APA therefore provides many safeguards to insure the independence of ALJs from agency pressure that could unduly influence them in their decision-making responsibilities. It bespeaks the high value placed on the decisional independence of

[4] "Hearing examiner" as a position title was changed to "administrative law judge" in 1978.

[5] As a reference to an ALJ, "his" is to be read as "his or her", "he" as "he or she" and "him" as "him or her."

ALJs and the centrality of this independence to maintaining the integrity of the administrative law system, both for the public perception of fairness and for the responsible execution by ALJs of their duties.

Decisions of ALJs may be reviewed by the Appeals Council in one of two ways. The claimant may appeal from the decision of an ALJ, which would bring the case before the Appeals Council. The Appeals Council could also decide to review a case on its "own motion" as specified in 20 C.F.R. §404.970:

> "(a) The Appeals Council will review a case if—
>
> (1) There appears to be an abuse of discretion by the administrative law judge;
>
> (2) There is an error of law;
>
> (3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence; or
>
> (4) There is a broad policy or procedural issue that may affect the general public interest."

An ALJ's decisions are not to be reviewed outside of these specific instances.

> "The Social Security and Administrative Procedure Acts prohibit substantive review and supervision of the administrative law judge in the performance of his quasi-judicial functions. His decisions may not be reviewed before publication, and after publication only by the Appeals Council in certain prescribed circumstances. He is subject only to such administrative supervision as may be required in the course of general office management." (Plaintiff's Exhibit 101 pp. 2-3, Position Description Administrative Law Judge).

Sua sponte review by the Appeals Council was an appropriate mechanism by which the Secretary could assure quality work by an ALJ. When Robert L. Trachtenberg began his tenure as Director of the BHA in 1975 he suspended such review by the Appeals Council. In its stead he initiated the "Peer Review Program" which was aimed at encouraging an ALJ to apply the provisions of the law and regulations in accordance with their intent. This review was not to interfere with an ALJ's "decisional independence." (Plaintiff's Exhibit 102.) The potential for abuse of such a review was apparent to Trachtenberg who noted "in the wrong hands, with the wrong attitude [this program] could cause a serious setback to the system of administrative justice ***. (*Ibid.*)

Trachtenberg changed the job description of Appeals Council members to include among their responsibilities the extra-appellate review of ALJs. Appeals Council members were to educate an ALJ by reviewing some of his dead cases in order to suggest to him how he might improve the quality of his decisions. (Irwin A. Freidenberg deposition [Docket No. 143] pp. 107-108). This review did not interfere with pending cases (Trachtenberg Trial Tesimony).

The ALJs in the New Orleans office were summoned to Arlington, VA by Chief ALJ Philip T. Brown as part of the review that BHA was conducting (Thomas J. D'Aquila deposition [Docket No. 137] pp. 5-6). According to Friedenberg the New Orleans judges were under review because of errors in their decisions including the misapplication of law and regulations and documentary deficiencies (Friedenberg deposition pp. 11-12). In other words, according to Freidenberg, these were cases that the Appeals Council would have taken under own motion

review, if it had been in effect, and reversed. New Orleans ALJ D'Aquila considered such review by Freidenberg to be an impingement on D'Aquila's decisional responsibility because Freidenberg was instructing as an individual, not as an Appeals Council member (D'Aquila deposition p. 23). However, D'Aquila would not have objected to the Appeals Council's own motion review of the cases (*Id.* at p. 26).

Ft. Smith (Ark.) ALJs were also brought to Arlington for counseling and training (Jerry K. Thomasson Trial Testimony; Burton Berkley deposition [Docket No. 118] p. 31). In general the decisions of the Ft. Smith ALJs were criticized for not providing sufficient rationales for their decisions and for issuing on-the-record decisions (Andrew J. Young deposition [Docket No. 125] p. 23).

Inasmuch as the review and feedback is not in the form of an official decision of the Appeals Council in an individual case, the plaintiff objects that the practice is "completely incompatible with the qualified right of decisional independence" conferred on ALJs by the APA (Plaintiff's Supplemental Reply Memo of October 1, 1984 p. 3). It must be noted that this "review is limited to after the fact determination of "dead cases" and therefore does not result in reversals of ALJs' determinations. Moreover, those giving counseling to ALJs do not issue binding instructions. The procedure is primarily educational, and the goal is more accurate initial decisions that better reflect the views of the agency on questions of law and policy. It is clear that ALJs' decisional independence does not include policy making powers. On the contrary, in such matters ALJs are entirely subject to the agency. *Ass'n of Administrative Law Judges v. Heckler*, 594 F.Supp. 1132, 1141 (D.D.C. 1984).

Although ALJs must be free from the agency's direct or indirect pressures that attempt to influence their determinations, they are not shielded from compliance with agency regulations promulgated to improve the efficiency and fairness of their decisions. It is the Secretary who is authorized to make the final decisions in disability cases; it is the Secretary's decision that is subject to federal court review. *Baker v. Heckler,* 730 F.2d 1147, 1150 (8th Cir. 1984). The Secretary is not bound to accept the initial decision by its ALJ merely because it is supported by substantial evidence. Rather, the Appeals Council in reviewing a recommended decision has "all the powers which it would have in making the initial decision ***." 5 U.S.C. §557(b). While it is the ALJ who conducts the agency hearing and who serves as the initial fact finder and decision maker, it is the Secretary who remains responsible for the administration and implementation of the agency's programs, and necessarily must establish rules for governing the day to day operation of the agency. Programs to insure a reasonable degree of uniformity within the system are to be encouraged.

> "Perhaps no characteristic of a procedural system is so uniformly denounced as a tendency to produce inconsistent results. When disposition depends more on which judge is assigned to the case than on the facts or the legal rules, the tendency is to describe the system as lawless, arbitrary or the like ***." *Santise v. Schweiker,* 676 F.2d 925, 930 (3d Cir. 1982) *cert. denied sub nom, Simmons v. Heckler,* 461 U.S. 911 (1983).

The institution of some form of a peer review program was a legitimate and lawful response to the wide disparity in legal and factual determinations among

ALJs. Given the dimensions of the problem, it would have been unrealistic for the Secretary to have relied solely upon official decisions of the Appeals Council to achieve significant uniformity and improved efficiency. The guidelines which may emerge from the feedback sessions are an acceptable form of agency supervision. *Cf. Heckler v. Campbell,* 461 U.S. 458, 466-467 (1983) (the individualized nature of disability hearings does not prevent the agency from relying on its rulemaking authority to determine issues that do not require case by case consideration).

According to the plaintiff, the defendants "admit" that ALJs who do not follow the recommendations that result from these allegedly unauthorized reviews may be subject to disciplinary proceedings (Plaintiff's Brief on Motion for Summary Judgment, May 10, 1984 pp. 5-6). Defendant Hays's response to the plaintiff's interrogatories was cited. However, the admission upon which the plaintiff relies does not strengthen his case. Hays states that "[i]t is probable that disciplinary action will be instituted against those ALJs who, in spite of counseling and additional training, continue to commit significant substantive errors in applying pertinent statutory and regulatory provisions to the issues before them for decision." (Hays's Response I(h) to Interrogatory No. 32). The APA does not prohibit an agency from gathering information to form an opinion about the ability and performance of its ALJs, or from using that information in a disciplinary proceeding. *See, Ass'n. of Administrative Law Judges v. Heckler, supra,* at 1141-1142. Good cause is still required for dismissal, and no adverse action can be taken against an ALJ based upon the statistical or quantitative variation of his reversal rate from any national average.

In sum, the review actions of which the plaintiff complains do not infringe upon his statutorily conferred right of decisional independence. They constitute legitimate administrative steps undertaken to enhance the quality and efficiency of the hearing system.

Concerning quotas, the issue of how to increase the production level of ALJs was perennially discussed, according to the plaintiff's testimony. The goal in the early 1960s, set orally, was twelve cases a month. In January 1975, due to a significant backlog of cases ALJs were urged to apply "a new vigor and aggressiveness" to their caseload to help relieve the problem (Defendants' Exhibit 32). In his memo of July 1, 1975 Trachtenberg asserted that he did not want to set quotas; however, he was recommending a goal of 26 cases per four-week period for those "who stated that they would like to know more precisely the scope of what needs to be done." (Plaintiff's Exhibit 111.) Hays, when he became Associate Commissioner of the Social Security Administration, established national or organizational objectives for ALJs of forty dispositions per month by September 1982 and 45 per month by September 1983 (Hays's Response to Interrogatory No. 11; Plaintiff's Exhibit 115). Trachtenberg and Hays were both interested in setting a point below which dismissal proceedings would, in the absence of extenuating circumstances, be warranted (Trachtenberg Trial Testimony; Hays's Response to Interrogatory No. 11). Trachtenberg initiated adverse proceedings against ALJ William J. O'Brien (Plaintiff's Exhibit 113), which would serve as a "test case" for disciplining ALJs for low productivity (Philip T. Brown Trial Testimony). If the case had been successful it would have been used to spur productivity among ALJs. Hays expected all ALJs to perform at a minimally acceptable level of efficiency and

proficiency. During his administration, all ALJs whose productivity for calendar year 1980 was not in excess of twenty cases per month were notified that their production was significantly below the norm (Hays's Response to Interrogatory No. 11). Hays also brought formal charges against ALJ Goodman because he felt Goodman's production was so low "in absolute terms and in relationship to *** the national average" (Hays deposition [Docket No. 114] pp. 130-131).[6] Other evidence exists in the record that attests to the continuing pressures on ALJs to increase their monthly number of dispositions.

The plaintiff does not, and could not tenably, allege that the setting of reasonable production goals is in itself an infringement of an ALJ's decisional independence. It is the responsibility of an ALJ to conduct a fair hearing and timeliness is one element of fairness in a disability hearing. Congress and the courts have attempted to set time limits on the various phases of the hearing process so that claimants, many of whom have no other means of support, will not be subject to unconscionable delays in the adjudication of their claims. *See, Caswell v. Califano,* 583 F.2d 9, 15-16 (1st Cir. 1978); *White v. Mathews,* 434

[6] Hays's complete response to his attorney's question whether he, in deciding to file charges against Goodman, had considered anything other than "his ability or inability to meet some magic raw number of decisions per month" was: "It wasn't his ability or inability to get a magic number. It was the fact that the amount, the quantity [sic], that he was producing was so low, both in absolute terms and in relationship to what—it was very clearly based among other things on the national average, based upon the average for the Administrative Law Judges in his region of the country were doing, that could be done. In other words, it was quite apparent to me based both on the low number that Judge Goodman was doing and the relatively high number that many, many other judges were doing, that that low number was in my opinion just unacceptably low."

F.Supp. 1252, 1261-1262 (D.Conn. 1976), *aff'd*, 559 F.2d 852 (2d Cir. 1977), *cert. denied, sub nom. Califano v. White*, 435 U.S. 908 (1978). These attempts have always been rejected as impracticable, given the magnitude and complexity of the administrative process, but it is clear that decisional promptness is important to the fairness of the adjudicatory process. It is therefore incumbent upon ALJs to place productivity high on their lists of priorities. The plaintiff contends, however, that the setting of numerical production quotas which *must* be met to avoid investigation and sanctions is an infringement of the ALJs decisional independence. A minimum number of dispositions an ALJ must decide in a given period, provided this number is reasonable and not "etched in stone", is not a prescription of how, or how quickly, an ALJ should decide a particular case. It does not dictate the content of the decision. It is not a performance appraisal in violation of 5 U.S.C. §7521. An ALJ is not immune from performance evaluations. "5 U.S.C. §7521(a) *** permits the institution of performance-related adverse actions despite the proscription of 5 U.S.C. §4301. *** By implication, then, an agency may gather data and form an opinion of an ALJ's performance." *Ass'n of Administrative Law Judges v. Heckler, supra* at 1140. While an ALJ's payment schedule and tenure are removed from the employing agency's control, an ALJ may still be terminated if there is "good cause" for such action. 5 U.S.C. §7521(a). The plaintiff agrees that low production could constitute good cause for dismissal (Plaintiff's Trial Testimony). The establishment and determination of good cause is not up to the employing agency but is the prerogative of the Merit Systems Protection Board. 5 U.S.C. §7521.

The facts then are clear that, at least since 1975, the BHA has set a series of quantum goals for monthly case dispositions of ALJs. However, this Court does not find that goals, reasonably fixed and applied, are an infringement of the judicial independence of an ALJ. Of course, any attempt by the agency to set production thresholds that are unreasonably high will be ineffective (see the plaintiff's testimony that the goal of 45 cases a month was never achieved) and counterproductive and could endanger the quality and fairness of the decisions.

The issue of reversal rates concerns appeals which an ALJ hears from claimants who have been denied Social Security benefits by the state agency. A determination by an ALJ that the claimant is actually entitled to benefits is a "reversal" of the denial by the state agency. The "reversal rate" of an ALJ then is the number of dispositions in which he has allowed the claimant to collect Social Security benefits expressed as a percentage or proportion of all cases decided by him.

Any attempt by the agency to control the reversal rate of an ALJ would be a clear infringement of decisional independence. Any predetermination of a uniform reversal rate for ALJs would have an obvious and inappropriately adverse impact on the hearing process. Did the Social Security Administration mandate a uniform reversal rate for its ALJs? The agency did collect and monitor statistics on the reversal rates of the ALJs (Andrew J. Young deposition [Docket No. 125] p. 16; Brown Trial Testimony). The agency however claims that there was no policy on reversal rates (Hays's deposition pp. 15-17) and that the statistics were not used to pressure ALJs to lower the rates (Young deposition pp. 26-27). Instead, the agency claims that it was only concerned with reversal rates to the extent that

they might indicate that there were problems in the adjudicatory process (*Ibid.*; Hays's deposition p. 20). A number of studies had established a correlation between errors in ALJs' decisions and extremes in reversal rates, on both ends of the spectrum (See Defendants' Exhibits 34, 36, 39 & 40). There was much discussion of reversal rates, Hays and Young admitted. The concern about an improper emphasis on reversal rates was great enough to prompt the Director of the Office of Appraisal in a memorandum entitled "Criteria for Removing Targeted ALJs from Review" sent to Associate Commissioner Hays to append his own longhand notation saying that "there is *no* goal to reduce reversal rates—there is a goal to improve decisional quality & consistency which is assumed to have as one effect a reduction of the reversal rate." (Plaintiff's Exhibit 106.) Hays was during his tenure also concerned about reversal rates and was happy to report the "good news" that there had been an overall drop. Hays explained this choice of words by saying that "I consider a decrease in the variance between the decisional results reached at different levels of adjudication to be an indication that the Social Security Administration is making progress in improving decisional quality and consistency within its adjudicatory system." (Hays's Response to Interrogatory No. 30.)

The plaintiff relies to a large extent on the experience of the ALJs in the New Orleans and Ft. Smith offices to show that the agency pressured ALJs concerning reversal rates. The ALJs in New Orleans *were* subject to significant pressure to lower their reversal rates (Augustus A. Simpson deposition [Docket No. 136] pp. 32-33, 39-43, 60-61, 74); D'Aquila deposition pp. 31-34; Joseph C. Collins, Jr. deposition [Docket No. 135] pp. 11, 15-16, 37, 69, 73-74, 77-78). However, the evidence shows

that the pressure in this office did not come only from the agency but rather from the ALJ-In-Charge, Carl Sarett. Sarett acknowledged that he "had a personal thing" about the reversal rates in the office (Carl Sarett deposition [Docket No. 124] pp. 23-24) and that he pressured the ALJs about the rates. Sarett was specifically reprimanded by Chief ALJ Brown for discussing reversal rates with his ALJs (Defendants' Exhibit 43; Brown's Trial Testimony). The agency was also concerned about such rates in the Ft. Smith office. Brown testified that one of the reasons Deputy Chief ALJ J. Robert Brown visited the Ft. Smith office was because of its high reversal rates. However it appears that the concern with reversal rates was considered as a reflection of problems in the adjudicatory process. The agency claimed that it was concerned about establishing the correctness of the ALJ decisions and was not interested in pressuring the ALJs to produce fewer reversals. Deputy Chief Brown was said to have been concerned about the *quality* of the decisions in the Ft. Smith office when he visited (Thomasson Trial Testimony).

Any attempt by the agency to mandate a prescribed reversal rate for the ALJ corps would clearly be inappropriate and would constitute an infringement of ALJs' decisional independence. In this case, while it is clear that the agency was concerned about reversal rates, the evidence does not support the allegations that ALJs were subject to any direct pressure to maintain a given rate.

The position of Administrative Law Judge is not a constitutionally protected position. *Ramspeck v. Trial Examiners Conf.*, 345 U.S. 128, 133 (1953). However, an ALJ does have a right to decisional independence, albeit

a qualified one. *Nash v. Califano, supra*, at 15. Although the defendants may have engaged in some questionable practices which clearly caused great unrest among ALJs, it is this Court's finding that they did not infringe on the decisional independence of ALJs.

Accordingly, it is hereby ORDERED that a judgment shall issue in favor of the defendants and against the plaintiff and dismissing the plaintiffs' remaining causes of action.

Dated: Buffalo, N. Y.
December 31, 1987

JOHN T. ELFVIN
U.S.D.J.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Case Number: Civil 78-281E

SIMON NASH,

Plaintiff,

v.

OTIS R. BOWEN, JOHN A. SVAHN, DONALD J. DEVINE, LOUIS B. HAYS, PHILIP T. BROWN and L. CHARLES LEONARD,

Defendants.

JUDGMENT IN A CIVIL CASE

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] **Decision by Court.** This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That a judgment shall issue in favor of the defendants and against the plaintiff and dismissing the plaintiffs' remaining causes of action.

January 7, 1988
Date

EDWARD P. GUETH, JR.
Edward P. Gueth, Jr.
Clerk

(By) *Deputy Clerk*

FILED
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U.S. DISTRICT COURT
W.D.N.Y.—BUFFALO

APPENDIX C

Memorandum and Order of District Court, dated March 16, 1988, Amending Memorandum and Order, dated December 31, 1987

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-78-281E

SIMON NASH,

Plaintiff,

vs.

OTIS R. BOWEN,[1] JOHN A. SVAHN, DONALD J. DEVINE, LOUIS B. HAYS, PHILIP T. BROWN and L. CHARLES LEONARD,

Defendants.

MEMORANDUM AND ORDER

The defendants have moved pursuant to Fed.R.Civ.P. rule 52(b) to amend this Court's Memorandum and Order filed January 6, 1988 awarding judgment in favor of the defendants following a bench trial. Two corrections have been requested.

The first concerns language on page 16 that attributes incorrectly the writing of a certain notation to the sender rather than to the recipient of a certain memo.

The second proposes an addition to footnote 6 which purports to contain the "complete response" by defendant Hays to a specific question posed at his

[1] The designation of the defendant has been changed pursuant to rule 25(d) of the Federal Rules of Civil Procedure.

deposition. The response as it therein appears is complete, as opposed to the fragments of that response quoted in the related text. The answer to a related follow-up question which the defendants wish to have included is part of the official record and need not be added to the footnote which is neither misleading nor ambiguous.

The plaintiff also has proposed a change that would correct an error on page three. Claims as to which the appellate court agreed the plaintiff had no standing are listed incorrectly as five, six and eight instead of four, five and six.

Accordingly, it is hereby ORDERED (1) that this Court's Memorandum and Order filed January 6, 1988 in the above-captioned case is amended so that the following language beginning on line 5 of page 16:

> "The concern about an improper emphasis on reversal rates was great enough to prompt the Director of the Office of Appraisal in a memorandum entitled 'Criteria for Removing Targeted ALJs from Review' sent to Associate Commissioner Hays to append his own longhand notation saying that 'there is *no* goal to reduce reversal rates—there is a goal to improve decisional quality & consistency which is assumed to have as one effect a reduction of the reversal rate.' (Plaintiff's Exhibit 106.)"

be amended to read:

> "The concern about an improper emphasis on reversal rates was great enough to prompt Associate Commissioner Hays himself to append to a subordinate's memorandum his own longhand notation that 'there is *no* goal to reduce reversal

rates—there is a goal to improve decisional quality & consistency which is assumed to have as one effect a reduction of the reversal rate.' (Plaintiff's Exhibit 106; Hays Deposition 134-35)."

(2) that the language at the beginning of the first full paragraph on page 3 which reads:

> "The appellate court, however, did concur with this Court's holding that the plaintiff lacked standing with respect to those claims denominated in the Second Amended Complaint as claims five, six, and eight. *Ibid.*"

be amended to read:

> "The appellate court, however, did concur with this Court's holding that the plaintiff lacked standing with respect to those claims denominated in the Amended Complaint as claims one, two and four. These claims, in somewhat altered form, were later denominated in the Second Amended Complaint as claims four, five and six. On March 30, 1984 the plaintiff moved for summary judgment on all eight claims in the Second Amended Complaint and on May 29, 1985 this Court denied the motion, holding that the plaintiff's first, second, third, fourth, and seventh claims involved disputed factual questions which should be the subject of a trial, but that the fifth, sixth and eighth claims should be dismissed due to the plaintiff's lack of standing to litigate those claims."

Dated: Buffalo, N. Y.
March 16, 1988

JOHN T. ELFVIN
U.S.D.J.

APPENDIX D

Memorandum and Order of District Court, dated May 29, 1985, Denying Plaintiff's Motion for Summary Judgment and Dismissing Claim No. 8, the Non-Acquiescence Claim

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-78-281E

SIMON NASH,

Plaintiff,

vs.

MARGARET M. HECKLER, JOHN A. SVAHN, DONALD J. DEVINE, LOUIS B. HAYS, PHILIP T. BROWN and L. CHARLES LEONARD,

Defendants.

MEMORANDUM AND ORDER

In this action by an Administrative Law Judge ("ALJ") employed by the Social Security Administration challenging numerous practices and policies of defendants which allegedly have improperly infringed his decisional independence, plaintiff has now moved for summary judgment.[1] The facts underlying this case are set forth in *Nash v. Califano*, 613 F.2d 10 (2d Cir. 1980), and need not be reiterated.

The Second Amended Complaint contains eight claims—namely, (1) that contrary to various provisions contained in the Administrative Procedure Act ("the

[1] Plaintiff's motion for recertification of this lawsuit as a class action was denied February 7, 1985.

APA"), 5 U.S.C. §551 *et seq.*, plaintiff's decisions as an ALJ have been reviewed by certain of the defendants and their subordinates under an "Appellate Appraisal System" or "Peer Review Program" and that substantive guidance and detailed instructions thereafter have been given to plaintiff, (2) that arbitrary and unlawful monthly production quotas have been imposed upon plaintiff by defendants with respect to the number of hearings, written decisions and other matters that he is expected to conduct and resolve as an ALJ, (3) that defendants' "Quality Assurance Program" has, directly and indirectly, improperly attempted to influence plaintiff's decisions in Social Security disability insurance cases, (4) that defendants' "Office Reconfiguration Plan" has unlawfully attempted to increase the production of ALJs by transferring certain adjudicative functions from ALJs to clerical and management personnel working on an "assembly-line" basis, (5) that the Secretary of Health and Human Services ("the Secretary") has improperly allowed members of her Appeals Council to "preside at the taking of evidence" with respect to disability application hearings by their consideration of additional evidence when reviewing decisions of ALJs, (6) that the combination of managerial and judicial functions performed by Regional Chief ALJs is violative of 5 U.S.C. §3105, (7) that the Secretary's publication of "Program Policy Statements" containing detailed examples of situations wherein claimants for disability benefits should either be awarded or denied such awards is in violation of the APA and the Social Security Act ("the Act"), 42 U.S.C. §301 *et seq.* and (8) that defendants' promulgation of "Rulings of Non-Acquiescence" directing ALJs to disregard the precedential significance of decisions by United States Courts of Appeals and United States District Courts is contrary to law.

Plaintiff seeks declaratory and injunctive relief. Defendants initially have argued that, although plaintiff may have standing to raise several of the claims asserted in the Second Amended Complaint—*see, Nash v. Califano, supra,* at 14-17—, he has no proper legal basis upon which to assert any of these claims inasmuch as neither the APA nor any other federal statute has expressly or implicitly created a right or cause of action in plaintiff's favor to assert the claims. However *Nash v. Califano, supra,* explained:

> "The APA provides that ALJs 'are entitled to pay prescribed by the Office of Personnel Management independently of agency recommendations or ratings.' 5 U.S.C. §5372. In addition, section 4301 and its implementing regulation (5 C.F.R. §930.211) exempts ALJs from the performance ratings prescribed for other civil service employees. ALJ tenure, moreover, is specially safeguarded by 5 U.S.C. §554, which provides that ALJs, unlike other civil servants, may not be removed without a formal adjudication."
>
> * * * * *
>
> "It is clear that these provisions confer a qualified right of decisional independence upon ALJs. ***" *Id.* at 15.
>
> "*** The express prohibitions of performance evaluations and substantive review contained in 5 U.S.C. §4301, and appellant's position description promulgated by the Bureau of Hearings and Appeals, give his injury the required direct impact upon statutorily created rights. These provisions, coupled with the direct, allegedly improper issuance of instructions to Nash and his fellow ALJs, make

> this 'a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant issuance of a declaratory judgment,' if the allegations are true." *Id.* at 17.

This Court interprets such language as meaning that, not only does an ALJ have standing to contest allegedly improper impairments of his decisional independence by these defendants, but also that such claims are cognizable under the provisions of the APA. *Cf. Association of Administrative Law Judges, Inc. v. Heckler,* No. 83-124 (D.D.C. September 10, 1984) (Action by ALJs asserting that the Secretary's "Bellmon Review Program" violated their decisional independence under the ALJ).

In considering plaintiff's instant motion this Court has taken note of the well-established standards and principles with respect to the granting of summary judgment,—namely, (a) that there must exist no disputed issue of material fact and the movant party must be entitled to judgment as a matter of law, (b) that the court cannot *try* factual issues but must merely determine whether such exist, (c) that the movant bears the burden of establishing the absence of material and genuine issues of fact and (d) that all ambiguities must be resolved and all reasonable inferences must be drawn against the moving party. *See, Katz v. Goodyear Tire and Rubber Co.,* 737 F.2d 238, 244 (2d Cir. 1984).

Plaintiff's first, third, fourth and seventh claims assert violations of the APA by defendants' alleged attempts to invade his qualified right of decisional independence by practices which have permitted his decisions improperly to be scrutinized for their correctness *vel non,* their having published and given detailed instructions and

guidance to him on such topics as the proper duration of a disability hearing, the form of decisions and how much evidence should be deemed sufficient in certain cases, their having made known to him and having attempted to influence him regarding what was considered by them to be an acceptable percentage of cases in which to authorize payment of disability benefits and their having required him to delegate statutory duties and responsibilities to clerical personnel. However, having considered the affidavit, deposition and other evidence and submissions presently before this Court, I do not find that plaintiff has established his entitlement to summary judgment. Serious and disputed factual questions remain with respect to defendants' intent, if any, to influence plaintiff's administrative decisions and their success *vel non* regarding such efforts.[2]

Plaintiff has not established that as a matter of law ALJs cannot be given feedback from the agency regarding the quality of their work or be provided with specific instructions and guidelines regarding the determination of disability decisions. Indeed, plaintiff has conceded that ALJs are entirely subject to the agency on matters of policy and law. Although the qualified right of decisional independence conferred upon ALJs by the APA no doubt precludes officials within the agency from telling an ALJ that he or she is deciding too many cases in favor of claimants and from improperly pressuring ALJs to render decisions denying awards of benefits, the Act authorizes the Secretary "to regulate

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[2] Indeed one court has held that an ALJ had failed to even state a claim due to the absence in the Complaint of allegations that the Secretary's "Peer Review Program" had *actually* infringed upon her decisional independence. *See Chocallo v. Bureau of Hearings and Appeals, SSA*, 548 F.Supp. 1349, 1370 (E.D.Pa. 1982), *aff'd without opinion*, 716 F.2d 889 (3d Cir.), *cert. denied*, _____ U.S. _____, 104 S.Ct. 426 (1983).

and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits" under the Act. 42 U.S.C. §405(a). The Secretary may properly promulgate regulations and guidelines which preclude the ALJ's reliance on vocational expert evidence and compel findings of disability or not in specific cases (*see Heckler v. Campbell*, 461 U.S. 458 (1983)) and, furthermore, ALJs lack standing to challenge regulations that merely curtail their adjudicative discretion rather than infringing their decisional independence. *See D'Amico v. Schweiker*, 698 F.2d 903, 905 (7th Cir. 1983). Plaintiff has not as yet sufficiently demonstrated that the Secretary's exercise of her authority to issue guidelines and instructions limiting the amount or type of evidence that ALJs may consider in reaching disability determinations had attempted to or had actually violated his qualified decisional independence.[3]

Plaintiff also is not presently entitled to relief regarding his second claim—namely, that defendants' imposition of monthly production quotas for ALJs constitutes a performance rating and an undue interference with ALJs' statutory independence. Although plaintiff has asserted that the failure of an ALJ to render forty-five decisions per month will lead to sanctions ranging from oral admonitions to the filing of formal charges with the Office of Personnel Management, defendant Hays's answers to plaintiff's interrogatories aver that he does not require an ALJ to

[3] During his deposition plaintiff initially had contended that the agency could not give an ALJ any comments on how they viewed the quality of his or her performance but he later conceded that such would be permissible as long as the superior did not direct the ALJ to write shorter opinions or tell the ALJ that particular opinions were considered incorrect.

produce a specific number of case dispositions each month and that the figure cited by plaintiff represents an objective for a national average disposition rate. The February 6, 1984 decision of the United States Merit Systems Protection Board in *Social Security Administration v. Goodman*, annexed as Exhibit 14-A to plaintiff's deposition transcript, is not supportive of plaintiff's claim inasmuch as that board therein held that a removal action against an ALJ could be premised on low case productivity but that the agency's statistical evidence establishing that the respondent's production level was less than one half of the national average had not adequately demonstrated good cause for his removal. The substantial factual dispute regarding plaintiff's second claim precludes any award of summary judgment.

Defendants have correctly contended that plaintiff's fifth, sixth and eighth claims should be dismissed due to his lack of standing to litigate these claims. Even were this Court to assume that plaintiff's allegations concerning these claims were accurate—namely, (a) that the Secretary had improperly allowed members of the Appeals Council to "preside at the taking of evidence," (b) that the Regional Chief ALJs were performing policymaking, managerial and supervisory duties inconsistent with their duties as ALJs and (c) that the Secretary's promulgation of "Rulings of Non-Acquiescence" was illegal—, neither plaintiff's qualified decisional independence nor his employment security is sufficiently influenced or endangered by such alleged practices as to provide him with proper legal standing to contest these claims. *See Nash v. Califano, supra*, at 17; *see also D'Amico v. Schweiker, supra.*

For these reasons it is hereby ORDERED that plaintiff's motion for summary judgment is denied, that the fifth, sixth and eighth claims contained in the Second Amended Complaint are dismissed and that plaintiff and counsel for defendants are directed to appear before this Court at Part II at 11:00 a.m. on June 24, 1985 to set a date for the trial of this action.

Dated: Buffalo, N. Y.
May 29, 1985

JOHN T. ELFVIN
U.S.D.J.

[10] **APPENDIX E**

Opinion of the United States Court of Appeals for the Second Circuit, dated January 7, 1980, Reversing the District Court's Judgment Dismissing Action for Lack of Standing, *Nash v. Califano*, 613 F.2d 10 (*Nash I*)

UNITED STATES COURT OF APPEALS
Second Circuit

No. 556, Docket 79-6180.

Submitted Dec. 18, 1979.

Decided Jan. 7, 1980.

SIMON NASH,

Plaintiff-Appellant

v.

JOSEPH A. CALIFANO, JR., STANFORD ROSS, ALAN K. CAMPBELL, ROBERT L. TRACHTENBERG, PHILIP T. BROWN, and WALLACE TANNENBAUM,

Defendants-Appellees.

Administrative law judge for Social Security Administration's Bureau of Hearings and Appeals sued the Secretary of Health, Education and Welfare, alleging that the rights conferred upon him and all other ALJ's by statute, regulation and prior agency practice are being infringed by SSA management policies. The United States District Court for the Western District of New York, John T. Elfvin, J., dismissed the complaint for want of standing to sue and ALJ appealed. The Court of Appeals, Irving R. Kaufman, Chief Judge, held that the

alleged invasion of the statutory right to decisional independence of the ALJ presented a justiciable controversy and the judge, who allegedly received mandatory, unlawful instructions regarding every detail of his judicial role, had standing to bring suit complaining of the invasion of his statutory rights; however, he had no standing to object to plan changes or to changes in title and functions of members of the Appeals Council and the regional chief ALJs.

Reversed and remanded.

Federal Civil Procedure 103

Alleged invasion of statutory right to decisional independence of administrative law judge in Social Security Administration's Bureau of Hearings and Appeals presented justiciable controversy and ALJ, [11] who allegedly received mandatory, unlawful instructions regarding every detail of his judicial role, had standing to bring suit complaining of invasion of his rights under statutes, regulations and prior agency practices; however, ALJ could not complain of plan changes or changes in titles and functions of members of Appeals Council and regional chief ALJs.

Simon Nash, *pro se.*

Alice Daniel, Acting Asst. Atty. Gen., Washington, D. C., Richard J. Arcara, U. S. Atty., Buffalo, N. Y., Robert Kopp, Barbara B. O'Malley, Kenneth J. Barnes, Civil Division, Dept. of Justice, Washington, D. C. (Burton Berkley, Sp. Counsel, Office of Hearings and Appeals, Social Security Administration and Sherry J. Leiwant, Asst. Regional Atty., Dept. of Health, Education and Welfare, Washington, D. C., of counsel), for defendants-appellees.

Before KAUFMAN, *Chief Judge,* and SMITH and TIMBERS, *Circuit Judges.*

IRVING R. KAUFMAN, *Chief Judge:*

Federal courts must pay scrupulous heed to Article III's limitation of our jurisdiction to actual cases or controversies. This requirement girds our judicial power within its proper sphere, and thereby legitimizes its exercise. Yet the doctrine of standing and justiciability, in which the case or controversy requirement plays an important part, must not be applied so as to deprive litigants of an authoritative resolution of genuine disputes. In the case at bar, Judge Elfvin found that an Administrative Law Judge subjected to an allegedly unauthorized regime of monitoring, evaluation and control had not suffered the injury-in-fact required by the doctrine of standing. He therefore granted defendants' motion for summary judgment and dismissed the action.[1] We reverse, holding that the alleged invasion of the appellant's statutory right to decisional independence, as set forth in the amended complaint, presents a justiciable controversy, and that the appellant has standing to bring suit. We do not, of course, express any views on the merits of appellant's claims.

I.

The appellant, Simon Nash, is an Administrative Law Judge (ALJ) of 22 years' experience in the Social Security Administration's Bureau of Hearings and

[1] Appelles filed their initial motion to dismiss, or, in the alternative, for summary judgment, addressed to the original complaint. After an amended complaint was filed, the appellees renewed their motions. Since affidavits and other documents were considered by the judge, the Rule 12(b)(6) motion, pursuant to that Rule, was "treated as one for summary judgment" as if brought under Rule 56.

Appeals.[2] The Bureau's ALJs, under authority directly delegated by the Secretary of Health, Education and Welfare (HEW),[3] hold hearings and decide appeals from agency denials of various claims for Social Security benefits.[4]

The Bureau's corps of approximately 650 ALJs is divided among 145 field offices, each one headed by an Administrative Law [12] Judge in Charge (ALJIC), who has managerial and administrative authority over all personnel assigned to his or her field office, in addition to responsibility for the same caseload as other ALJs. ALJICs receive the same salaries as other ALJs. Each ALJIC reports to one of the ten Regional Chief Administrative Law Judges who, in turn, are under the managerial authority of the Director of the Bureau of Hearings and Appeals and his chief assistant, the Chief Administrative Law Judge. While Administrative Law Judges are civil service employees, the Director of the Bureau is appointed by, and serves at the pleasure of, the Commissioner of the Social Security Administration.

[2] The statutory title of "Administrative Law Judge" was bestowed upon federal hearing examiners by P.L. 95-251, 92 Stat. 183 (1978). In January 1979, the name of the Bureau of Hearings and Appeals was changed to "Office of Hearings and Appeals" and its Director became an Associate Commissioner of the Social Security Administration. In the interest of consistency, however, we shall refer to the Office as the Bureau of Hearings and Appeals throughout.

[3] The Social Security Administration is now part of the newly reorganized Department of Health and Human Services, whose Secretary is Patricia Roberts Harris.

[4] Appeals from denials of claims for Disability Insurance and Supplemental Security Income benefits under the Social Security Act, 42 U.S.C. §§423 & 1381a, constitute a large proportion of the caseload of ALJs within the Bureau. Indeed, in over 90% of cases, the issue is whether the claimant is disabled. The hearings, which are conducted pursuant to section 205(b) of the Social Security Act, 42 U.S.C. §405(b), must conform to the requirements of the Administrative Procedure Act, 5 U.S.C. §551ff.

In December of 1967, Judge Nash became ALJIC for the Buffalo field office. During his tenure in that position, he, along with numerous other ALJICs, urged adoption of a number of administrative reforms—including the hiring of staff attorneys and the use of summary opinions in appropriate cases—to cope with the mounting backlog of cases before the Bureau of Hearings and Appeals. These pleas for reform went unheeded until 1975, when appellee Robert Trachtenberg was appointed Director of the Bureau.[5] Facing a record backlog of 113,000 cases,[6] Director Trachtenberg instituted many of the reforms long advocated by Nash and his colleagues.

Trachtenberg's goal of eliminating unconscionable delays in processing appeals is, of course, commendable. Appellant, however, alleges that appellees and their staff employees have interfered with the decisional independence of the administrative law judges in

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[5] Mr. Trachtenberg resigned as Associate Commissioner of the Social Security Administration effective May 1, 1979, and was replaced by Andrew J. Young, effective October 22, 1979. The other defendants are the Secretary of Health, Education & Welfare, Joseph A. Califano, Stanford Ross, Commissioner of Social Security, Alan K. Campbell, Chairman of the U. S. Civil Service Commission, Philip T. Brown, Chief Administrative Law Judge of the Bureau of Hearings and Appeals and Wallace Tannenbaum, Regional Chief Administrative Law Judge of Region II, which includes all field offices located in New York State, New Jersey and Puerto Rico.

[6] Several courts have found that the long delays in processing appeals from denials of Social Security benefits have denied claimants the right to a hearing within the reasonable time called for by 42 U.S.C. §405(b). In *White v. Mathews*, 559 F.2d 852 (2d Cir. 1977), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978), this court affirmed an order granting prospective benefits to claimants who had not received administrative adjudication of their claims within specified time periods. Similar cases include *Caswell v. Califano*, 583 F.2d 9 (1st Cir. 1978) and *Blankenship v. Mathews*, CCH Unemployment Ins. Rep. ¶14739 (W.D.Ky., May 6, 1976).

violation of the Administrative Procedure Act, the Social Security Act and the due process clause of the Fifth Amendment. On January 19, 1978, Nash filed a formal grievance against Regional Chief ALJ Tannenbaum, alleging that he had interfered improperly with the internal operations of the Buffalo field office. One month later, Tannenbaum summarily demoted plaintiff from his position as ALJIC to ALJ, affording him neither a statement of reasons, nor any opportunity for a hearing.

On May 30, 1978, Nash, proceeding *pro se*, filed a lengthy complaint in the United States District Court for the Western District of New York seeking his reinstatement as ALJIC, and a judgment declaring invalid a number of official actions allegedly performed by Director Trachtenberg and his administrative subordinates. On September 27, 1978, Judge Elfvin denied plaintiff's motion for a preliminary injunction, noting, *inter alia*, that since his demotion from ALJIC to ALJ entailed no loss of income, he could not be said to have suffered irreparable injury. The issue of appellant's demotion, however, is not before us on this appeal for, on December 20, 1978, appellant (represented by counsel at this juncture) filed an amended complaint challenging six allegedly unlawful practices instituted by the defendants, and carefully avoided any mention of his demotion.

The first practice challenged in the complaint is the Bureau's "Regional Office Peer Review Program." According to Nash, [13] Trachtenberg, Brown and Tannenbaum, as well as non-ALJ members of their staffs, known as "Development Center Analysts" and "Program Operation Officers," review the work of ALJs outside the normal appellate process. In conjunction with this ongoing review, the appellees or their staffs give plaintiff and all other ALJs detailed, purportedly

mandatory instructions concerning the proper length of hearings and opinions, the amount of evidence required in specific cases, and the proper use of expert witnesses. Through the Peer Review Program, the Bureau has allegedly arrogated to itself the power to control the conduct of hearings vested in ALJs by the Administrative Procedure Act, 5 U.S.C. §556.

Nash also avers that an arbitrary monthly production quota has been established for him and all his colleagues. Unless an ALJ renders a specified number of decisions per month, the agency, appellant claims, threatens to file incompetence charges against him with the Civil Service Commission.[7] In his view, the agency's production quota constitutes a performance rating forbidden by the Administrative Procedure Act, 5 U.S.C. §4301(2)(E) and 5 C.F.R. §930.211.

An additional threat to the ALJs statutory independence is allegedly posed by the so-called "Quality Assurance Program," which attempts to control the number of decisions denying Social Security Benefits. The agency has "let it be known" that the average 50% "reversal rate" for all ALJs is an "acceptable" one. Appellant further claims in his amended complaint that the reversal rates of all ALJs are monitored, and those who deviate from the mean are counseled and admonished to bring their rates in line with the national average. This attempt to influence the ALJs'

[7] In 1978, Congress enacted the Civil Service Reform Act of 1978, P.L. 96-454, 92 Stat. 1119 (1978), which abolished the Civil Service Commission and substituted in its place the Office of Personnel Management and Merit Systems Protection Board. Although the Act worked a substantial revision of the Civil Service system, it did not alter the statutory status of ALJs. In the interest of clarity, we shall continue to refer to the Office of Personnel Management as the Civil Service Commission throughout this opinion.

decisionmaking process, it is urged, violates 5 U.S.C. §§556 & 3105 and the Fifth Amendment to the Constitution.

Nash's fourth claim centers upon plans that call for the national implementation (in whole or in part) of an "Employee Pool System" developed at the White Plains, New York field office with the knowledge and approval of the Director. Under this program, many of the ALJs' judicial responsibilities—including the writing of decisions—are vested in clerical and managerial personnel. The use of such "mass production" techniques, it is charged, violates 5 U.S.C. §§556(c) & 3105.

The amended complaint goes on to contest the authority of the Secretary of HEW to delegate the power to hold hearings to members of the Appeals Council. Although no members of the Council are alleged to have held hearings in that capacity, Nash asserts that such power may be vested only in an ALJ. Finally, he contends, the Chief ALJ and the 10 Regional Chief ALJs improperly combine judicial and managerial duties in violation of 5 U.S.C. §3105.

On June 4, 1979, the district court heard argument on appellant's motion for certification of a class consisting of all ALJs similarly situated, and on appellees' motion to dismiss the complaint for failure to state a claim, or in the alternative for summary judgment. Without addressing Nash's claims separately, but after considering affidavits and submitted documents, Judge Elfvin, apparently treating the motion as one for summary judgment, dismissed the amended complaint for lack of standing in a colloquial statement delivered after argument, since he found "nothing right here and

now that lands on . . . Judge Nash."[8] No written opinion was filed by the district judge. Judgment dismissing [14] the complaint was entered on July 10, 1979 and this appeal, *pro se*, followed.

II.

Article III limits federal judicial power to the adjudication of "cases or controversies." Thus, a threshold question in every suit is whether plaintiff has alleged that he has in fact suffered (or is imminently subject to suffering) a cognizable injury. *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Beyond this irreducible constitutional requirement, courts have come to weigh a number of "prudential" considerations to determine whether the complainant is a proper plaintiff to raise and litigate the controversy alleged. Thus, in *Association v. Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970), the Court required that "the interest sought to be protected by the complainant [be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Accord, Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977).[9]

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[8] The district judge also stated that if his standing determination were reversed on appeal, he would grant the motion for class certification. We assume that Judge Elfvin's observation that plaintiff is a "capable" class representative was premised upon the fact that he was represented by counsel at that time.

[9] In *Data Processing*, moreover, the Court gave the constitutional branch of the standing requirement an expansive reading, opining in *dictum* that noneconomic or nonpunitive injuries to aesthetic, conservational or recreational interests, or an injury to one's spiritual stake in First Amendment values would be sufficient to establish constitutional standing. 397 U.S. at 154, 90 S.Ct. 827.

The appellees attempt to cast Nash in the role of a plaintiff contesting the validity of a penal statute or the policies of a prosecuting authority when he is neither prosecuted nor threatened with prosecution. *See S. v. D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 793 (1973); *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); *Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923). In so doing, they misperceive the essential nature of Nash's complaint, and ignore the principle that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *S. v. D., supra*, 410 U.S. at 617 n.3, 93 S.Ct. at 1148 n.3, *accord, Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 88 S.Ct. 651, 19 L.Ed.2d 787 (1968). The gravamen of appellant's complaint is that rights conferred upon him and all other ALJs by statute, regulation and prior agency practice are being continuously infringed by the appellees' actions. Accordingly, we must turn to the sources of the right asserted to assess appellant's claim of injury.

III.

As *Data Processing* stressed, standing analysis does not examine the merits of the underlying claim. 397 U.S. at 153, 90 S.Ct. 827. Rather, our inquiry centers solely upon the allegations of the complaint. Taking these allegations to be true, as we are required to do on an appeal from the dismissal of a complaint for lack of standing, *Warth v. Seldin, supra*, 422 U.S. at 501, 95 S.Ct. 2197, we must determine whether the alleged inroads on ALJs' decisional independence are arguably within the zone of interests protected by the Administrative Procedure Act and Social Security Act.

Although Nash purports to represent a class of ALJs, he must, as class representative, allege the required injury on his own behalf. *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974).

As originally enacted in 1946, the Administrative Procedure Act (APA) vested hearing examiners (as ALJs were then called) with a limited independence from the agencies they served. The hearing examiners had previously been on a par with other agency employees, their compensation and promotion dependent upon agency ratings. The expanding scope of agency activity during the 1930s and early 1940s led to increasingly heavy criticism,[10] however, be- [15] cause the hearing examiners came to be perceived as "mere tools of the agency concerned." *Ramspeck v. Trial Examiners Conference*, 345 U.S. 128, 131, 73 S.Ct. 570, 572, 97 L.Ed. 872 (1953). In response, Congress enacted §11 of the APA, removing control over the hearing examiners' tenure and compensation from the agencies and vesting it, to a large degree, in the Civil Service Commission.

The APA provides that ALJs "are entitled to pay prescribed by the Office of Personnel Management independently of agency recommendations or ratings." 5 U.S.C. §5372. In addition, section 4301 and its implementing regulation (5 C.F.R. §930.211) exempts ALJs from the performance ratings prescribed for other civil service employees. ALJ tenure, moreover, is specially safeguarded by 5 U.S.C. §554, which provides that ALJs, unlike other civil servants, may not be removed without a formal adjudication.

[10] *See, e. g.*, Administrative Procedure Act-Legislative History. S.Doc.No. 248, 79th Cong.2d Sess. (1946); Thomas, *The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process*, 59 Yale L.J. 431 (1950).

These statutory provisions draw upon the more ancient wisdom grounded in history and contained in Article III, which safeguards federal judicial independence through still more stringent compensation and tenure provisions. *See* Kaufman, *Chilling Judicial Independence,* 88 Yale L.J. 681 (1979). The independent judiciary is structurally insulated from the other branches to provide a safe haven for individual liberties in times of crisis.[11] By analogy, "the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency." *Butz v. Economou,* 438 U.S. 478, 513, 98 S.Ct. 2894, 2914, 57 L.Ed.2d 895 (1978).

It is clear that these provisions confer a qualified right of decisional independence upon ALJs. First recognized by the Supreme Court in *Ramspeck v. Trial Examiners Conference,* 345 U.S. 128, 73 S.Ct. 370, 97 L.Ed. 872 (1953), this special status is a creation of statute, rather than the Constitution. And as their role has expanded, the ALJs' functional comparability to judges has gained recognition. For example, in *Butz v. Economou,* 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), the Supreme Court held that ALJs enjoy absolute immunity from liability in damages for actions taken in their quasi-judicial capacity.

The Social Security Administration has, moreover, recognized the limitations upon its power over the ALJs' decisionmaking process. The position description for

[11] *See* E. Burke, *Reflections on the Revolution in France* 242 (T. Mahoney ed. 1952). The ideal of judicial independence antedates the Constitution. Indeed, one of the grievances against George III listed in the Declaration of Independence was: "He has made Judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."

ALJs issued by the Administration's Bureau of Hearings and Appeals states that ALJs possess "full and complete individual independence of action and decision . . . without review [and] full responsibility and authority" for the conduct of hearings and the disposition of cases. "The Social Security and Administrative Program Acts," the description continues, "prohibit substantive review and supervision of the [ALJ] in the performance of his quasi-judicial functions. His decisions may not be reviewed before publication, and after publication only by the Appeals Council in certain prescribed circumstances. He is subject only to such administrative supervision as may be required in the course of general office management."

It is not insignificant that when Director Trachtenberg instituted the extraordinary review and counseling practices challenged in Nash's complaint, he recognized their potential dangers. In a memorandum dated February 7, 1977 to the Regional Chief ALJs setting forth the Regional Office Peer Review Program, he wrote:

> "You can readily discern from this memorandum my concern and, indeed, my resolve that none of these programs, including this new regional technical review [16] effort, should denigrate or undermine the ALJs' substantive independence. While these programs can serve a needed, valued public service, in the wrong hands, with the wrong attitude, and without constant vigilance, they could cause a serious setback to the system of administrative justice of which we all rightly should be proud. Simply stated, I will not let this occur and, rather than countenance any such possible effect, I would rescind any or all portion [sic] of these programs. "I am confident, however, that these programs will succeed as designed and intended. I have a particular sense of confidence that, under your close

> supervision, you will not permit any abridgement of the ALJs' independence and that your peer review role will be handled with sophistication and sensitivity."

Although these statements may be probative of an essentially benign intent on the appellees' part, the memorandum leaves little doubt that it was recognized that the management initiatives it set into motion could well impinge upon the zone of interests protected by the APA.

Director Trachtenberg apparently entertained similar doubts as to the propriety of instituting special programs for low-producing and high- and low-reversing ALJs. In a letter dated November 1, 1977, he solicited the comments of the Executive Director of the U. S. Civil Service Commission on possible conflicts between the Quality Assurance System and the Administrative Procedure Act or Civil Service Commission regulations. The Executive Director was of the opinion that the system, as outlined to him, would not violate the APA but qualified his statement appropriately: "Agency programs which seek to enhance the efficiency and quality of an adjudicatory program are in the public interest *so long as they do not impinge upon the decisional independence of Administrative Law Judges.*" (emphasis supplied).

The APA creates a comprehensive bulwark to protect ALJs from agency interference. The independence granted to ALJs is designed to maintain public confidence in the essential fairness of the process through which Social Security benefits are allocated by ensuring impartial decisionmaking. Since that independence is expressed in terms of such personal rights as compensation, tenure and freedom from performance evaluations and extraordinary review, we cannot say that ALJs are so disinterested as to lack

even standing to safeguard their own independence. *See Carter v. Jury Commission of Greene County,* 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970).[12]

The scrutiny and affirmative direction alleged by Nash reaches virtually every aspect of an ALJs' daily role. Under the Quality Assurance System and the Peer Review Program, the number of reversals, the number of dispositions, and the manner of trying and deciding each case are recorded and measured against prescribed standards. ALJ Nash and his colleagues allegedly receive mandatory, unlawful instructions regarding every detail of their judicial role. Nash, therefore, has "the personal stake and interest that impart the concrete adverseness required by Article III." *Barlow v. Collins,* 397 U.S. 159, 164, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970).[13]

[12] In Carter the Supreme Court held that Black citizens who were fully qualified to serve as jurors under state statute, but nonetheless were excluded because of their race, had standing to seek a judgment declaring the selection process unconstitutional. *Carter, supra,* 396 U.S. at 329-30, 90 S.Ct. 518. The Court concluded that the plaintiffs had been injured in fact by restrictive selection practices because the exclusion on account of race was " 'practically a brand upon [the jurors]. . . . an assertion of their inferiority.' " *Id.* at 330, 90 S.Ct. at 524, *quoting Strauder v. West Virginia,* 100 U.S. 303, 308, 25 L.Ed. 664 (1879). It went on to note, moreover, that the discrimination evidenced in the record "contravenes the very idea of a jury . . . 'a body truly representative of the community.' " *Id., quoting Smith v. Texas,* 311 U.S. 128, 130, 61 S.Ct. 164, 85 L.Ed. 84 (1940). Just as Carter was permitted to assert an interest in the integrity of the jury system, Nash should be permitted to assert his analogous interest in the decisional independence of the ALJs.

[13] The appellees, in their briefs, direct this court's attention to an agreement entered into by defendants in settlement of an action entitled *Bono v. Social Security Administration,* C.A. No. 77-0619-CV-W (W.D.Mo. settled June 19, 1979). The agreement states, in pertinent part, "OHA [the Bureau] will revise its transfer and training policies to eliminate any specific mention of production figures as criteria." At present this court does not have before it a factual record sufficient to determine whether or not this stipulation moots the appellant's "quota system" claim. Appellees' mootness argument may be addressed to the district court on remand.

[17] The second branch of the *Data Processing* test—the zone of interest requirement—is amply satisfied by the legislative protection for the ALJs' decisional independence, set forth above. The express prohibitions of performance evaluations and substantive review contained in 5 U.S.C. §4301, and appellant's position description promulgated by the Bureau of Hearings and Appeals, give his injury the required direct impact upon statutorily created rights. These provisions, coupled with the direct, allegedly improper issuance of instructions to Nash and his fellow ALJs, make this "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant issuance of a declaratory judgment," if the allegations are true. *Lake Carriers' Association v. MacMullan*, 406 U.S. 498, 506, 92 S.Ct. 1749, 32 L.Ed.2d 257 (1972), *quoting Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 61 S.Ct. 510, 85 L.Ed. 826 (1941).

IV.

Nash's remaining claims stand on a different footing. In contrast to the practices discussed above, the Employee Pool System has not been instituted at the Buffalo Field Office where appellant works. Nash's submissions to the court indicate that the plan is highly experimental and subject to ongoing revision, and his complaint alleges merely that "plans have been made for its being put into operation, wholly or partially" in his field office. Even accepting his statement as true, we cannot perceive an element of harm since the System's future effect upon Nash remains a matter of speculation. Judge Elfvin was correct in finding a lack of standing to assert this claim, since the amended complaint fails to allege the "immediate danger" required to sustain standing under *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1979). In challenging the titles and functions of members of the Appeals Council and the Regional Chief ALJs, Nash again fails to allege

any harm. He contests the Secretary's delegation of the power to hold hearings to non-ALJ Appeals Council members. But Director Trachtenberg avers that no member of the Appeals Council has ever tried a case in that capacity, and Nash does not dispute this. Similarly, even if the Regional Chief ALJs' administrative duties were found to be "inconsistent with their duties and responsibilities as hearing examiners," 5 U.S.C. §3105, the resulting realignment of titles and responsibilities would not necessarily free appellant from the administrative "harassment" of which he complains. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1972); *S. v. D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 793 (1973).

Finally, we reiterate that our discussion of Nash's standing to sue in no way reflects upon the merits of his claims. We merely note that premature dismissal for want of standing may deprive litigants of the "focused and careful decision on the merits to which they are clearly entitled." *Barlow v. Collins, supra*, 397 U.S. at 168, 90 S.Ct. at 839 (Brennan, J., dissenting). The current explosion of claims and appeals within the Social Security system has posed an awesome challenge to effective administration, and our holding is not intended to undermine the Bureau's good faith attempts to meet this challenge. By providing an authoritative delineation of the respective rights and powers of the parties to this litigation, and by recognizing that good administration must not encroach upon adjudicative independence, the district court on remand will have the opportunity to advance the principal goal of judicial and quasi-judicial administration: reduction of delay without compromise to the demands of [18] due process, of which judicial independence is but one, important part.

APPENDIX F

Oral Opinion of the District Court Rendered on June 4, 1979, Dismissing Action, and Order and Judgment Thereon

[350] UNITED STATES DISTRICT COURT
Western District of New York

Filed
Jun 14 (Illegible) '79
U.S. District Court
W.D. of N.Y.

CIV-78-281

SIMON NASH,

Plaintiff,

vs.

JOSEPH A. CALIFANO, JR., ET AL.,

Defendants.

Excerpt of proceedings of a Motion held before the HON. JOHN T. ELFVIN, United States District Judge, in Part II, United States Court House, Buffalo, New York, on June 4, 1979.

APPEARANCES:

BEATRICE KENNEDY, Esq.,
Attorney for the Plaintiff.

BURTON BERKLEY, Esq.,
Office of Hearings & Appeals and
KENNETH J. BARNES, Esq.,
Attorneys for the Defendants.

[351] PROCEEDINGS: June 4, 1979.

APPEARANCES: As before noted.

THE COURT: All right.

Anything more by either one of you?

MS. KENNEDY: Nothing, your Honor.

MR. BARNES: No, your Honor.

THE COURT: Now, there isn't any question in my mind at this juncture, particularly when we view the type of case that this is, that it very properly could have been brought and can be brought as a Class Action with the class to comprise all of those acting Administrative Law Judges who want to be in the case which would be determined, if we were to go on that path, by sending out a notice to all of them and giving them an opportunity to opt out and coming down to a class. The other aspects of the Class Action are, to my mind, sufficiently present so that that would be the way of proceeding. Now, I state that because we have the two
[352] motions, namely the motion to certify the action as a Class Action and, further, we have the motion to dismiss.

If the action is to go ahead, it is or will be my determination that it should go ahead as a Class Action on those terms. However, in my present decision, and what I have said about a Class Action is still pertinent because obviously there are courts who sit above me who may take a different view of my attitude of the basic question of whether the action should go forward, should be allowed to go forward, and my decision on that is that it should not. If, however, I am reversed on that and the matter is remanded, I am only saying that it will go on as a Class Action because I view Judge Nash to be a

capable representative in his own position in the matter and as represented by you; and I view it to be a type of case that would lend itself very easily and very well to a Class Action approach.

I am going to grant, however, the motion to dismiss that the Government has made and I do this with [353] appreciation of the provisions of Section 2201 of Title 28 which deals with declaratory judgment action where the true case and controversy that is otherwise required for Federal jurisdiction is not as much present, but still it must be an actual controversy. I view the difference there as being perhaps one's dread of harm that has not yet landed upon the individual who seeks the declaratory judgment but is so imminent so much on the track, headed toward his station that it is going to arrive unless it is cut off or declared in advance in a declaratory judgment attitude as to the legality of what is happening.

I view this case as falling short of that, and I recognize the sincerity and the great controversy that Judge Nash has found himself and finds himself in as a matter of principle, p-l-e; the great principles that he espouses and undoubtedly should be declared and straightened out in [354] some way at sometime. I say nothing about my own personal views at this moment as to whether this type of supervision is correct or incorrect. It is true, whether it is at your level, Judge Nash, or other levels or my level, there is a great overload of cases and a great need to dispose of cases and, yet, all of that must go on in a proper form, a proper fashion, in a proper way without anyone's finger getting unduly into the pie of judicial determination. That must go on in a proper way. But I see nothing right here and now that lands on you, Judge Nash, or on any of the others; and of course, it must land

on you before you could be a representative of the class, in any way that brings a case in controversy or a presently justiciable matter to this Court.

If these matters are implemented, if they are carried forward in the way that you fear they are going to be
[355] carried forward so that if yourself, although according to Mr. Barnes your record seems to be salutory, you yourself are not running head into any problem of being adjudged deficient in the quality or quantity of your work, and I assume that is going on; but if it should not and if some sanction should be imposed on you then, of course, you would have immediately the standing to come in and complain about that. As I say, you do not now have it. If someone who is dealing with the Social Security cases finds that he or she has been ruled against, denied relief because of any implementation of any of these unlawful practices, whether it be by the fact that someone has presided over a hearing who is not an A.L.J. and, consequently, should not and could not have been hearing it, consequently the result is a nullity; or whether that person feels tenably that there has been so much pressure brought to bear upon the A.L.J.'s in
[356] getting things done so that they are not able to pay attention to the merits of what is before him or if some disposition of the case is imposed upon him through this looking through closed cases *re* reversals and nonreversals (which to my mind I do not see how anything such as that can exist), but if that impinged upon the right of some individual who had a claim he or she brought against the Social Security for disability or some other relief, that person obviously would be in a position to make the claim.

What I am saying actually is I give you stars, flares and skyrockets for your involvement of principle, p-l-e, Judge Nash, but I find that you have nothing involved at this point by way of principal, p-a-l; and on that basis I grant the motion to dismiss.

* * * * * *

I certify that the foregoing is a true and correct copy of the foregoing to the best of my ability.

EDWARD (ILLEGIBLE)

Adopted as changed.
John T. Elfvin
U.S.D.J.
June 14, 1979

[357] UNITED STATES DISTRICT COURT
Western District of New York

Civil Action
No. CIV-78-281

SIMON NASH,

Plaintiff,

v.

JOSEPH A. CALIFANO, JR., et al.,

Defendants.

ORDER

This matter having come before the Court on Defendants' Motion to Dismiss Amended Complaint or in the Alternative for Summary Judgment, the memoranda, affidavits and other documents filed in support thereof and in opposition thereto, oral argument having been heard on June 4, 1979, the Court being fully advised in the premises, this action is hereby ordered dismissed for lack of standing.

SO ORDERED.

JOHN T. ELFVIN
United States District Judge

Dated: July 10, 1979,
Buffalo, N.Y.

Filed
Jul 10 3:35 PM '79
U.S. District Court
W.D. of N.Y.

[358] Judgment on Decision by the Court Civ 32 (7-63)

Filed
Jul 10 1979
At_____O'C_____M.
John K. Adams, Clerk

UNITED STATES DISTRICT COURT
For the
Western District of New York

Civil Action File No. Civ-78-281

SIMON NASH,

vs.

JOSEPH A. CALIFANO, JR., et al.

JUDGMENT

This action came on for (hearing) before the Court, Honorable JOHN T. ELFVIN, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the action is dismissed for lack of standing

Dated at Buffalo, New York, this 10th day of July, 1979.

JOHN K. ADAMS
John K. Adams
Clerk of Court

APPENDIX G

Judgment of Court of Appeals,
Entered March 7, 1989

UNITED STATES COURT OF APPEALS

#174 Mandate	For the Second Circuit	WDNY 78 CIV 281E ELFVIN

Filed 89 Apr 5 AM 8:19 U.S. District Court W.D. of Buffalo	Filed Mar 07 1989 Elaine B. Goldsmith, Clerk United States Court of Appeals Second Circuit

Issued as Mandate: 3-31-89

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of March one thousand nine hundred and eighty-nine.

Present: HON. WILFRED FEINBERG
HON. JON O. NEWMAN
HON. FRANK X. ALTIMARI
Circuit Judges,

Docket No. 88-6066.

SIMON NASH,
Plaintiff-Appellant,

v.

OTIS R. BOWEN, JOHN A. SVAHN, DONALD J. DEVINE, LOUIS B. HAYS, PHILIP T. BROWN, and L. CHARLES LEONARD,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

Elaine B. Goldsmith,
Clerk

EDWARD J. GUARDARO
by: Edward J. Guardaro,
Deputy Clerk

A True Copy
Elaine B. Goldsmith
by: Kathleen Brown
Deputy Clerk

APPENDIX H

Order of District Court, Adopting Mandate of Court of Appeals as Judgment of District Court, Dated April 16, 1989

Filed
89 Apr 18 PM 3:35
U.S. District Court
W.D.N.Y.-Buffalo

UNITED STATES DISTRICT COURT
Western District of New York

Civ-78-281E

SIMON NASH,

Plaintiff,

v.

OTIS R. BOWEN, *et al.*,

Defendants.

A certified copy of the mandate of the United States Court of Appeals for the Second Circuit dated March 7, 1989, having been filed in the office of the Clerk of this court on April 5, 1989, it is hereby

ORDERED, ADJUDGED AND DECREED that said mandate be, and hereby is, made the judgment of this court.

JOHN T. ELFVIN
John T. Elfvin
United States District Judge

Dated: April 16, 1989
Buffalo, N.Y.

APPENDIX I

Relevant Statutes; Rule 52, Fed. R. of Civ. P.

Relevant Statutes — Rule 52(a)

Social Security Act —
Section 205(b) 42 USC 405(b)

§405. Evidence, procedure, and certification for payments

(a) Rules and regulations; procedures

The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

(b) Administrative determination of entitlement to benefits statement; findings of fact; hearings; investigations; evidentiary hearings in reconsiderations of disability benefit terminations

(1) The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any decision by the Secretary which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based. Upon

request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, surviving divorced father, husband, divorced husband, widower, surviving divorced husband, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision. Any such request with respect to such a decision must be filed within sixty days after notice of such decision is received by the individual making such request. The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure.

Administrative Procedure Act
5 USC 551 ff.

#554 Adjudications.

(a) This section applies . . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. . . .

#556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence--

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more administrative law judges appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplication of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. . . . A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in

accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary. (Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 386.)

#557 Initial decisions. . . .

(b) When the agency did not preside at the reception of the evidence, the presiding employee . . . shall initially decide the case. . . . When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision. . . . When the agency makes the decision without having presided at the reception of the evidence, the presiding employee . . . shall first recommend a decision.

#1305. Administrative Law Judges.

For the purposes of sections 3105, 3344, 4301 (2)(D), and 5372 of this title, and the provisions of section 5335(a)(B) of this title that relate to administrative law judges, the Office of Personnel Management may investigate, require reports by agencies, issue reports, including an annual report to Congress, prescribe regulations, appoint advisory committees as necessary, recommend legislation, subpena witnesses and records, and pay witness fees as established for the courts of the United States.

#3105. Appointment of Administrative Law Judges.

Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.

Chapter 43 — Performance Appraisal

#4301. Definitions.

For the purposes of this sub-chapter—

(1) "agency" means—

(A) an Executive agency. . . .

(2) "employee" means an individual employed in or under an agency, but does not include—. . .

(D) an administrative law judge appointed under section 3105 of this title.

§7521. Actions against administrative law judges

(a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

(b) The actions covered by this section are—

(1) a removal;

(2) a suspension;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but do not include—

(A) a suspension or removal under section 7532 of this title;

(B) a reduction-in-force action under section 3502 of this title; or

(C) any action initiated under section 1206 of this title.

Federal Rules of Civil Procedure

* * * *

Rule 52. Findings by the Court

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of

fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(b) AMENDMENT. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

APPENDIX J

Selected Excerpts from Trial Record, Relative to Agency Policy on Reversal Rates and Pressure on ALJs to Reduce Reversal Rates (Claim No. 3)

1. Memorandum from Associate Commissioner for Hearings and Appeals (Mr. Hays) to Commissioner of Social Security (Mr. Svahn), dated October 6, 1981 (Plaintiff's Exhibit No. 121):

> "Finally, we are hiring additional central office staff to allow us to review ALJ reversal decisions under the Bellmon Amendment. This is critical to our efforts which will result in a lowering of the reversal rate.
>
> In summary, we have begun a series of initiatives which will increase the disposition rate from 30 cases per ALJ per month in FY80 to 45 or higher in FY83 . . . and reduce the reversal rate from its present level of 55 percent to perhaps 45 percent . . ." (Plaintiff's Exhibit 121, App. Bk. 11, p. 2164).

2. Memorandum from Mr. Hays to Mr. Svahn, date illegible (Plaintiff's Exhibit No. 120):

> "Good news and bad news—the good news is that the reversal rate for July declined to 54.0 percent for all cases and 60.1 percent for Title II disability, in comparison with 55.2 percent and 61.7 percent for June. . . ." (App. Bk. 11, p. 2163).

3. Memorandum from Mr. Hays to Mr. Svahn, dated November 10, 1981 (Plaintiff's Exhibit No. 122):

> "The average ALJ reversal rate declined to 53.4 percent for the month of September, down from 54

percent for August. This represents a total drop of 2.4 percent since May .... October reversal rates are not yet available." (*Ibid.*, p. 2165).

4. Memorandum from ALJIC Sarett (New Orleans) to CALJ Brown dated December 5, 1977:

"As you can see by the monthly report for November, the reversal rate continues to be extreme, Judge Ponder granted 24 and denied only 2; Judge Collins granted 23 and denied 7; Judge D'Aquila granted 20 and denied 5. For the record, I was 13 and 14 (App. Bk. 6, p. 1212).

5. Memorandum from ALJIC Sarett to CALJ Brown, dated January 5, 1978:

"I feel compelled, however, to call your attention to the continued incredible reversal rate of some judges here. For the month of December, 1977, Judge Ponder affirmed 8 cases and reversed 22. Judge D'Aquila affirmed 4 and reversed 28.

6. Extract from ALJIC Sarett's notes on meeting of ALJs in New Orleans, after counseling sessions in Arlington, Va.:

"*Reversals*—

hope got message there-their 70-90% R's are cons'd abnormal-talk w. Friedenberg—(also see *Study Rept.*-10% off mean (a 50% R) cons'd aberration & corrective measures by BHA *should be taken.*" (App. Bk. 6, p. 1205).

7. Extract from "Study Report" (Defendants' Exhibit 58):

"One strong approach to achieving consistency is to assign a reversal quota of 50% + or - 10% to each judge. If we assume that most judges rank the

strength of cases in roughly the same way (an assumption supported by the discriminant analysis), and that their existing variance or disagreement concerns the position of the disability standard on the disability continuum, horizontal equity would almost certainly be improved and the extreme variations eliminated. Indeed, a curve-grading technique, with predetermined quotas for each grade classification is a common approach to inter-teacher variance in assigning grades in educational institutions." (App. Bk. 12, pp. 2511-2512).

APPENDIX K

Selected Clippings from *The New York Times*, Relative to Claim No. 3 (Reversal Rates) and Claim No. 8 (Non-Acquiescence)

1. Sunday, January 8, 1989—"National"—page 16:

Judges Who Decide Social Security Claims Say Agency Goads Them to Deny Benefits

By MARTIN TOLCHIN
Special to The New York Times

WASHINGTON, Jan. 7 — Many of the judges who decide claims for Government disability and health insurance charge that they are being harassed by the Social Security Administration in an effort to reduce costs.

"We have gotten allegations from administrative law judges of coercion, threatened transfers and other kinds of pressures," said Representative Barney Frank, Democrat of Massachusetts, who is chairman of a House Judiciary subcommittee that will hold hearings on the allegations next month.

"The harassment is all in the interest of keeping awards down for sick and needy people," Mr. Frank said.

The agency denies that it harasses the law judges. It says it monitors them to increase their productivity and reduce costs.

"We're not aware of any allegations of harassment," said Phil Gambino, chief spokesman for the Social Security Administration. "We recognize and support the need for independence."

But through their national organization, the Association of Administrative Law Judges, a number of judges have said the Social Security Administration imposes a monthly quota of cases and retaliates against those who do not meet it. Some say the agency also punishes those who award benefits it considers excessive.

Russell Barone, an administrative law judge in Chicago, said the agency recently turned down his request for a transfer to Buffalo because he had decided an average of only 31 cases a month instead of 37.

Paul Rosenthal of Newport Beach, Calif., the former chief administrative law judge at the Social Security Administration, said that as punishment for an effort to increase the judges' top salaries, now $71,377 a year, he was ordered not to accept an award from the American Bar Association in 1986. The award commended Mr. Rosenthal and the agency's judges for "outstanding efforts to protect the integrity of administrative adjudication within their agency."

Mr. Rosenthal said his persistent efforts on behalf of the law judges led the agency to demote him in March 1987. He retired last month.

Louis D. Enoff, the agency's Deputy Commissioner for Programs, said some agency officials considered the Bar Association award an insult to the Social Security Administration, feeling that it took the judges' side in their dispute with the agency. But he said he was unaware that Mr. Rosenthal had been ordered not to accept the award.

A long-running dispute over independence.

The judges, who have lifetime tenure, are part of a national corps, hired by Federal agencies to decide disputes involving eligibility and awards under Government programs. Their status is similar to that of Federal judges under a law that deems them "independent and secure in their tenure and compensation."

Of 1,034 administrative law judges, 696 work for the Social Security Administration, where they hear appeals from people denied disability or health insurance benefits. There are about 300,000 such hearings a year.

Charges of harassment have been made by judges working for other agencies, but the judges assert that the Social Security Administration is the worst offender.

In 1982 the agency began to review the decisions of all judges who allowed benefits in 70 percent of their decisions or more. It warned them that if their performance did not change, "other steps" would be considered.

That policy drew sharp criticism from Congress and brought a lawsuit from the Association of Administrative Law Judges. The agency dropped the review procedure in 1984, and the lawsuit was dismissed, although a Federal district judge in Chicago said the policy had "created an untenable atmosphere of tension and unfairness" that could have compromised the independence of the judges.

But some judges say the agency still exerts indirect pressure to hold down the benefits. The agency has taken away secretaries and lawyers reporting to individual judges, replacing them with personnel pools that the judges say remain under the agency's authority and are sometimes manipulated to discipline them. The agency says the move was needed for greater efficiency, but some judges say the net effect was to take away their independence and ability to act impartially.

"The Social Security Administration doesn't treat judges like judges," said Nahum Litt, the chief administrative law judge at the Department of Labor. "They treat them as other employees."

Mr. Litt said the problem arose from a conflict between budget-minded agency officials and judges who are supposed to be disinterested in the fiscal effects of their rulings.

"The agency has consistently tried to control the ability of A.L.J.'s to function as independent adjudicators," said Ronald J. Bernoski, an administrative law judge in Milwaukee who is secretary of the law judges' association.

W. C. Lynch, a Social Security Administration law judge in Eugene, Ore., who is a member of the association's board of directors, said, "There is a wealth of evidence that if an A.L.J. incurs the ire of the Social Security Administration, he very likely would not get certain assignments, travel arrangements, transfers and other things that he wanted. It's not too subtle."

Both men testified last month at a hearing of the House Ways and Means Committee, but only after being publicly assured that the agency would not punish them for their testimony.

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In Federal Departments

Are Judge and Agency Too Close for Justice?

By MARTIN TOLCHIN

WASHINGTON

WHEN a corporation or a private citizen disputes a Federal agency's decision — involving, say, a disability pension or an allegation of unfair labor practices — an administrative law judge decides who is right. But more and more, critics are raising questions about the atmosphere in which these decisions are rendered, given that one party in every case is the agency that employs the judge.

The 1,100 administrative law judges, who were called hearing officers until a 1978 law changed their titles, are in some ways like Federal District Court judges, to whom the Supreme Court has said they are "functionally comparable." They interpret the Federal regulations enforced by the particular agency to which they are assigned, and some judges and their petitioners agree with critics of the system who say that subtle pressures are applied to encourage rulings that do not displease agency officials.

One critic, Senator Howell Heflin, an Alabama Democrat who is a former state judge, maintains that the judicial independence of the law judges is at stake. He has sponsored legislation that he says will project that independence.

But others like Marshall Breger, chairman of the Administrative Conference of the United States, an advisory group composed mostly of officials of Federal agencies, oppose Mr. Heflin's proposals. "We are unaware of any strong evidence that the existing system is not working properly," Mr. Breger said.

To be eligible for appointment as an administrative law judge — a lifetime job that pays up to $82,500 a year — a lawyer must have at least seven years' trial experience and pass an examination on general legal knowledge. After certification by the Office of Personnel Management, the lawyer's name is placed in a central registry, from which the various agencies select judges.

More than 700 administrative law judges work for the Social Security Administration, 90 work for the Department of Labor, 85 for the National Labor Relations Board, and the rest are divided among 26 other agencies in offices around the country.

The judges' offices are in the agencies that hired them, and the agency's seal adorns their hearing rooms. Some of the judges are former staff attorneys for the agencies. Small wonder that they are sometimes taken for officials of those agencies rather than independent judges.

"There's a perception that people are not getting a fair shake from us because we're Department of Labor A.L.J.'s," said Nahum Litt, the Labor Department's chief administrative law judge.

The Social Security Administration is the agency perhaps most frequently accused of interference with its administrative judges, who hear 300,000 appeals a year. In 1982 the agency began to review the decisions of all judges who allowed disability benefits in 70 percent or more of their decisions. It warned them that if this did not change, "other steps" would be considered.

That policy drew sharp criticism from Congress and prompted a lawsuit by the Association of Administrative Law Judges. The agency dropped the review procedure in 1984, and the lawsuit was dismissed, although a Federal judge in Chicago said the policy had "created an untenable atmosphere of tension and unfairness."

Last month, the administrative judges' group contended that its members were once again being improperly pressured by the Social Security agency. The group said that the agency was restricting travel and transfers of judges and taking other punitive steps against those who failed to settle a monthly quota of 37 cases or who awarded benefits it considered excessive.

The New York Times/Lisa Berg

Nahum Litt, the Labor Department's chief administrative law judge.

The agency denied it. "We recognize and support the need for independence" of the judges, said Phil Gambino, a Social Security spokesman. Senator Heflin's bill would separate the judges from the agencies and make them part of an "administrative law judges corps." The judges would continue to have their specialties, but would not have to depend upon the agencies for the necessities of office.

Mr. Heflin said he does not expect his bill to be passed soon, adding that the executive branch historically has tended to side with the agencies on matters involving administrative judges. "They're afraid that the independence might mean judicial decisions that might thwart an Administration's overall policy," Mr. Heflin said.

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2. Sunday, February 5, 1989—p. 2E:

The New York Times

—NEW YORK, SUNDAY, MAY 13, 1984—

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"All the News That's Fit to Print"

VOL. CXXXIII .... No. 46,043

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U.S. FLOUTS COURTS IN DETERMINATION OF BENEFIT CLAIMS

Social Security Agency Obeys in Specific Cases but Will Not Extend Principles

By ROBERT PEAR

Special to The New York Times

WASHINGTON, May 12 — The Social Security Administration is denying benefits to thousands of people in situations similar to cases in which Federal courts have ordered payment, and Federal judges around the country have denounced the practice as lawless.

Social Security officials say they always obey decisions of the Supreme Court and apply them in cases comparable to those the Court decides. But they say they do not consider decisions of lower courts binding, except for the plaintiffs in the individual cases, when the rulings and interpretations conflict with the agency's regulations and policies.

The officials say they cannot operate a uniform nationwide program if they have to follow the potentially conflicting decisions of various courts around the country.

Disability Claims Involved

Judges, however, say such a practice of "nonacquiescence" in the decisions of lower courts undermines the rule of law and violates the Constitution. In the last year, at least two Federal judges have threatened to cite the Secretary of Health and Human Services, Margaret M. Heckler, for contempt of court.

Many of the rulings the Social Security Administration disregards involve disputes over eligibility for disability benefits, monthly payments to people who are too ill or injured to work.

In the case of Audrey Nelson, a North Dakota woman, for example, the Social Security Administration stopped her disability benefits in 1981, saying back injuries she suffered in 1972 no longer prevented her from working.

The United States Court of Appeals for the Eighth Circuit, however, in ruling in Mrs. Nelson's favor, said the Social Security officials were disregarding several court decisions that required them to consider pain as a factor in assessing disability.

"For some unexplained reason," the appeals judges said, "the Secretary insists upon ignoring this court's statements" that she must consider subjective complaints of pain, even if they are not fully corroborated by objective medical evidence.

3. Sunday, May 13, 1984—page 1—(Non-Acquiescence):

Many of the disregarded decisions, some of them involving old-age and survivor benefits and Supplemental Security Income, a Federal welfare program, as well as the disability payments, contain explicit guidelines for the agency's action on benefits in certain situations and say that these guidelines should apply in all similar cases.

But the Social Security Administration, either by issuing a formal notice of nonacquiescence in the court's decision or by merely disregarding it through a policy of what its officials call "informal nonacquiescence," follows the decision only in the case at issue. The officials say they do not even have to apply the court's ruling to similar situations in the same state or judicial circuit.

In a decision two weeks ago, the Chief Judge of the Federal District Court in Minnesota, Miles W. Lord, said Social Security officials were acting in "direct contravention of Federal court edicts." He wrote:

"The Secretary apparently has decided to obey only the edicts of the U.S. Supreme Court. At the same time, however, the Secretary refuses to appeal adverse rulings to the Supreme Court, thus depriving the Court of the opportunity to issue opinions on disputed issues."

An Issue in Congress

In March, the House of Representatives passed a bill meant to increase compliance with court orders. Under the bill, if a Federal appeals court issues a ruling favorable to Social Security recipients, the Government must either apply it uniformly to all beneficiaries living in the circuit or appeal to the Supreme Court. But the Reagan Administration strongly opposes this provision, and it is uncertain whether the Senate will accept it.

In the last year many Federal judges have complained of the Social Security Administration's attitude toward decisions of the lower courts. In Colorado, Federal District Judge John L. Kane Jr. said the Secretary's actions "reveal a clearly rebellious frame of mind."

In California, Judge Harry Pregerson of the Court of Appeals for the Ninth Circuit said the policy was like the "pre-Civil War doctrine of nullification, whereby rebellious states refused to recognize certain Federal laws within their boundaries."

"The Secretary's nonacquiescence not only scoffs at the law of this circuit," Judge Pregerson said, "but flouts some very important principles basic to our American system of government — the rule of law, the doctrine of separation of powers imbedded in the Constitution, and the tenet of judicial supremacy." That tenet was laid down by the Supreme Court in 1803.

I.R.S. Similarity Asserted

In Arizona, Federal District Judge Valdemar A. Cordova struck down a recent nonacquiescence notice as "contrary to law." It manifested a "conscious and willful decision" to disregard appellate court rulings, he said.

Louis B. Hays, an Associate Commissioner of Social Security for the last three years, now temporarily assigned to the Office of Management and Budget, told Congress, "We have a policy of either acquiescing in court decisions and following them, or nonacquiescing in court decisions and not following them." He said this policy "has some similarities" to the practice of the Internal Revenue Service.

Joel Gerber, special assistant to the chief counsel of the Internal Revenue Service, said the tax agency followed the precedent set by Federal appeals court decisions within the circuit where they were issued. He said the tax agency might, at the same time, seek a different ruling in another circuit, in the hope that the Supreme Court would agree to resolve the conflict.

By contrast, Social Security officials say they do not regard appeals court decisions as binding even in the circuit where they are issued.

'No Threat' to Courts

For three years, the Reagan Administration has been trying to trim the disability rolls by cutting off benefits for people able to work. Officials acknowledge that they have made errors in this process, and last month, under criticism from Congress and many governors, Social Security officials suspended their efforts to cut off disability payments. But the moratorium did not apply to the thousands of people with cases pending in Federal courts or to people seeking benefits for the first time.

Some Justice Department lawyers have privately expressed doubts about the propriety of Social Security's nonacquiescence policy, but the department has often defended it in court.

Testifying recently before the Senate Finance Committee, Carolyn B. Kuhl, a deputy assistant attorney general, said, "The nonacquiescence doctrine, like the traditional Government practice of challenging settled precedents in test cases, in no way threatens the position of the judicial branch."

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Supreme Court, U.S.
FILED
JUL 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1906

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

SIMON NASH, PETITIONER

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary of Health and Human Services' Quality Assurance System violated petitioner's right of decisional independence as an ALJ.

2. Whether petitioner has standing to challenge the Secretary's policy of non-acquiscence in his capacity as an ALJ.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 869 F.2d 675. The opinions of the district court (Pet. App. 16a-31a, 33a-35a, 36a-43a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 68a-69a) was filed on March 7, 1989. The petition for a writ of certiorari was filed on May 25, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an Administrative Law Judge (ALJ) in the Social Security Administration's Bureau of Hearings and Appeals. The respondents are the Secretary of Health and Human Services, the Commissioner of the Social Security Administration, the Director of the Office of Personnel Management, and various officials of the Bureau of Hearings and Appeals within the Social Security Administration.

In 1975, the Bureau was faced with a backlog of more than 113,000 cases. To reduce the backlog, the Bureau set up several programs for its ALJs. Three are relevant here. Under the "Peer Review Program," the Bureau engaged in post-adjudicatory review of ALJ decisions and offered instructions to ALJs on the length of hearings and opinions and the use of expert witnesses. Through the "Quality Assurance System," the Bureau monitored the rates at which ALJs reversed state decisions not to award Social Security benefits, attempted to identify recurring problems, and made recommendations for improving the hearing process. Finally, the Bureau established monthly production goals to reduce delays experienced by claimants. Pet. App. 48a, 49a-50a.

In 1978, petitioner filed suit in district court challenging the enforcement of these programs as inconsistent with the "decisional independence" (Pet. App. 46a) of ALJs. The district court dismissed petitioner's action in 1979 for lack of standing. *Id.* at 61a-67a.

The court of appeals reversed in substantial part. 613 F.2d 10 (1980) (*Nash I*) Pet. App. 44a-60a. Stating that the Administrative Procedure Act (APA) conferred on ALJs a "special status" and a "qualified right" of decisional independence (*id.* at 55a), the court held that petitioner's complaints with respect to the Peer Review Program, the

Quality Assurance System, and monthly production goals fell "within the zone of interests protected by the Administrative Procedure Act and Social Security Act" (*id.* at 53a), and remanded to the district court for further proceedings.

2. Following the remand, petitioner amended his complaint to add a challenge to the Secretary's policy of nonacquiescence. That claim was dismissed by the district court for lack of standing (Pet. App. 42a), and the remaining claims were tried by the court. After a bench trial, the district court held in favor of the respondents on all counts. *Id.* at 16a-32a. Relying on *Nash I*, the district court began with the assumption that the APA provided petitioner with a right of action against the respondents. *Id.* at 17a. Nonetheless, the court found that the Peer Review Program was "primarily educational" and that the Bureau's "goal [was] more accurate initial decisions that better reflect the views of the agency on questions of law and policy" (*id.* at 22a). The court concluded that this was a "legitimate and lawful response to the wide disparity in legal and factual determinations among ALJs" (*id.* at 23a-24a). With respect to the Quality Assurance System, the court credited Bureau evidence that demonstrated that " 'there is *no* goal to reduce reversal rates—there is a goal to improve decisional quality & [*sic*] consistency which is assumed to have as one effect a reduction of the reversal rate' " (*id.* at 29a (quoting PX 106; emphasis in original)). The court acknowledged that petitioner had offered evidence that in two locations, New Orleans, Louisiana, and Fort Smith, Arkansas, AJLs had been pressured to lower the rates at which they reversed the denial of benefits by state agencies (*id.* at 29a). The court found, however, that the pressure in New Orleans "did not come only from the agency but rather from the ALJ-In-Charge"

and that he was "specifically reprimanded" for his actions (*id.* at 30a). The court also found that the Bureau was concerned about reversal rates at Fort Smith, but, here again, "the concern with reversal rates was * * * a reflection of problems in the adjudicatory process" (*ibid.*). The court concluded that "while it is clear that the agency was concerned about reversal rates, the evidence does not support the allegations that ALJs were subject to any direct pressure to maintain a given rate" (*ibid.*). Finally, the court found that the Bureau had not established "quotas" (*id.* at 25a) to mark the production level of ALJs, but rather had only set "reasonable production goals" (*id.* at 26a). The court found that the target was "not 'etched in stone,' [was] not a prescription of how, or how quickly, an ALJ should decide a particular case," and "[did] not dictate the content of the decision" (*id.* at 27a). Accordingly, the court concluded that "goals, reasonably fixed and applied, [were not] an infringement of the judicial independence of an ALJ" (*id.* at 28a).

3. The court of appeals affirmed the district court's judgment in all respects. 869 F.2d 675 (1989) (*Nash II*); Pet. App. 1a-15a. First, the court affirmed the order dismissing petitioner's non-acquiescence claim for lack of standing. The court reasoned that the "only adverse consequence" for petitioner was that "his decisions are subject to reversal by the Secretary" (*id.* at 6a). The court held that this was a legally insufficient interest to confer standing on petitioner.

Next, the court addressed petitioner's decisional independence claims. It held that petitioner's challenges to the Peer Review Program and Quality Assurance System were barred by the prior judgment in *Association of ALJs* v. *Heckler*, 594 F. Supp. 1132 (D.D.C. 1984). The court observed that petitioner was "a member of the Associa-

tion, that he consulted with the Association's counsel about the D.C. district court litigation, and that he shared certain documents with the Association for use in its case" (Pet. App. 8a-10a). It ruled that petitioner "appears to have had a full and fair opportunity to be heard in that case" (*id.* at 10a).

Although there were "very substantial, if not dispositive, arguments in favor of application of the rule of *res judicata,*" the court felt "obliged to reach the merits of [petitioner's] claims in view of our strong intimation in *Nash I* that [petitioner] was entitled to a plenary trial" (Pet. App. 10a-11a). Before doing so, the court clarified that its reference to a "qualified right of decisional independence" of ALJs (*id.* at 55a) in *Nash I* was "*dicta*" and explained that "*Nash I* stands only for the narrow premise that [petitioner] has standing to pursue his claims" (*id.* at 8a). The court declined to resolve whether petitioner had a cause of action under the APA, however, because "the district court rejected [petitioner's] claims on their merits" (*ibid.*). Thus, the court proceeded on the assumption that petitioner had a right of decisional independence separate and apart from the statutory protections attaching to his pay, tenure, and freedom from performance reviews.

Realizing that "[p]olicies designed to insure a reasonable degree of uniformity among ALJ decisions are not only within the bounds of legitimate agency supervision but are to be encouraged" (Pet. App. 11a), the court could find "no reason to disturb [the district court's] determination" that the Peer Review Program and production goals "operated as[] a quality control measure" (*id.* at 12a). The court then turned to petitioner's claims regarding the Quality Assurance System, which the court thought might be "cause for concern" (*id.* at 13a). However, after referring to record evidence indicating that "reversal rates were

used as a benchmark in deciding whether there *might* be problems in the adjudicatory methods of particularly high (or low) reversal rate ALJs," the court concluded that the district court's findings were not clearly erroneous (*id.* at 14a (emphasis in original)). "Since the district court found no direct pressure on ALJs to maintain a fixed percentage of reversals," the court concluded that "the Secretary's policy in this regard did not infringe upon the 'decisional independence' of ALJs" (*id.* at 15a).

ARGUMENT

Petitioner raises two issues for review by this Court: (1) whether the Quality Assurance System violated his right of decisional independence as an ALJ; and (2) whether he has standing to challenge the Secretary's policy of non-acquiescence. Neither issue warrants review. Petitioner's challenge to the Quality Assurance System is barred by *res judicata*; in any event, even assuming that petitioner has a cause of action under the APA for interference with his decisional independence, both lower courts correctly concluded that no such interference had been shown on the facts of this case. And petitioner lacks standing to challenge the Secretary's non-acquiescence practice because he has not suffered the requisite injury-in-fact.

1. a. The petition does not respond to the court of appeals' holding that the challenge to the Quality Assurance System is barred by *res judicata*. See Pet. App. 8a-11a. In *Association of ALJs* v. *Heckler*, 594 F. Supp. 1132 (D.D.C. 1984), a national association of ALJs mounted a "broad challenge to various practices of the Secretary substantially identical to those advanced by [petitioner] in this case" (Pet. App. 9a). The complaint specifically alleged that "the Secretary had infringed upon the decisional independence of ALJs through policies and practices de-

signed to monitor the decisions of ALJs and 'pressure [them] into disposing of . . . larger numbers of cases each year' and 'into deciding fewer cases in favor of claimants' " (*ibid.* (quoting Compl. para. 18 in *Association of ALJs*; brackets and ellipsis in original)). It is uncontroverted that petitioner was a member of the Association, consulted with its counsel about the litigation, and shared documents with the Association for use in its case. See *ibid.* It follows that petitioner "appears to have had a full and fair opportunity to be heard in that case" (*id.* at 10a). Petitioner's claim is therefore barred by the judgment in *Association of ALJs*. *Res judicata* fully supports the judgment in this case, and petitioner has offered no reason for questioning the court's ruling on this point.

b. Even if petitioner's claims were not barred by *res judicata*, the court of appeals' alternate holding rejecting the claim on the merits would not warrant review. Petitioner claims an intra-circuit conflict between *Nash I* and *Nash II* and an inter-circuit conflict between *Nash I* and a decision of the Seventh Circuit, *D'Amico* v. *Schweiker*, 698 F.2d 903 (1983), over whether the APA grants ALJs a cause of action for infringement of their decisional independence. See Pet. 9-13, 23. However, *Nash I* does not conflict with the other decisions because, as the court of appeals explained in *Nash II*, its prior statement that the APA "confer[s] a qualified right of decisional independence upon ALJs" (Pet. App. 55a), was *dicta*. The court of appeals decided *Nash I* on an appeal from the district court's judgment dismissing petitioner's action for lack of standing, and so did not reach the merits of petitioner's claim. Thus, "*Nash I* stands only for the narrow premise that [petitioner] has standing to pursue his claims" (Pet. App. 8a). See also *id.* at 4a.* Cf. *Goodman* v. *Svahn*, 614

* There is no inconsistency in holding that a party has standing but has no cause of action. See *Council of & for the Blind* v. *Regan*, 709

F. Supp. 726, 729 n.3 (D.D.C. 1985) (*Nash I* "simply held that an ALJ * * * was improperly dismissed for lack of standing. * * * [I]ts decision on standing had no bearing on the merits of Nash's claim.").

Nor is there an "apparent conflict" (Pet. 12) between this case and *D'Amico* v. *Schweiker*, *supra*. *D'Amico* "only * * * consider[ed ALJs'] standing to sue" to challenge a Social Security Administration instruction concerning retroactive cessation of benefits. 698 F.2d at 904. It made no statement regarding a possible cause of action to enforce ALJs' decisional independence and hence does not conflict with the decision in this case. Any tension that exists is between *D'Amico* and *Nash I*—*D'Amico* held that ALJs lacked standing while *Nash I* held that they did. But these judgments are not before the Court, and, in any event, *D'Amico* found *Nash I* distinguishable on the facts. See 698 F.2d at 906-907.

c. This case would not, in any event, be an appropriate vehicle for review of the question whether ALJs have a cause of action to enforce their decisional independence, because petitioner would not prevail even if such a right is recognized. The district court assumed that "[a]ny attempt by the agency to mandate a prescribed reversal rate for the ALJ corps would clearly be inappropriate and would constitute an infringement of ALJs' decisional independence" (Pet. App. 30a). Nevertheless, the district judge found that "[i]n this case, while it is clear that the agency was concerned about reversal rates, the evidence does not support the allegations that ALJs were subject to any direct pressure to maintain a given rate" (*ibid.*). Accordingly, the district court found that the Secretary's practices "did not

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F.2d 1521, 1524-1525 & n.12 (D.C. Cir. 1983) (en banc) (holding that plaintiff failed to state a claim notwithstanding earlier decision that plaintiff had standing).

infringe on the decisional independence of ALJs" (*id.* at 31a).

Petitioner asserts that the court of appeals erred in affirming the district court's findings concerning the Quality Assurance System, and specifically that an incident involving ALJs in New Orleans demonstrates that the policy infringed ALJs' decisional independence. See Pet. 13-19. The district court, however, determined that the pressure in New Orleans originated in factors unique to that office ("the evidence shows that the pressure in [the New Orleans] office did not come only from the agency but rather from the ALJ-In-Charge, Carl Sarett" (Pet. App. 29a-30a)), and hence that episode cannot be relied on by petitioner—a Buffalo, New York-based ALJ—to substantiate the infringement of his decisional independence. The New Orleans incident was not evidence of deficiencies in the Secretary's policy and the ALJ-In-Charge was "reprimanded by Chief ALJ Brown for discussing reversal rates with his ALJs" (*id.* at 30a). The court of appeals reviewed the record before the district court and agreed that there was "no direct pressure on ALJs to maintain a fixed percentage of reversals" (*id.* at 15a). Petitioner's fact-bound question was decided correctly by the lower courts and does not warrant further review.

2. Whatever the merits of the Secretary's policy of non-acquiescence, petitioner lacks standing to challenge it because he has not suffered the requisite injury-in-fact. As the court of appeals explained, "[t]he only adverse consequence for [petitioner] resulting from non-acquiescence is that his decisions are subject to reversal by the Secretary" (Pet. App. 6a). This academic interest falls far short of the "distinct and palpable injury to himself" that petitioner must demonstrate (*Warth* v. *Seldin*, 422 U.S. 490, 501 (1975)).

Moreover, disappointed claimants have a far more acute and tangible interest in the Secretary's non-acquiescence policy than do ALJs, and they have, on several occasions, demonstrated their willingness to pursue such challenges. See, *e.g.*, *Floyd* v. *Bowen*, 833 F.2d 529, 531-532 (5th Cir. 1987); *Stieberger* v. *Bowen*, 801 F.2d 29, 30-38 (2d Cir. 1986); *Schisler* v. *Heckler*, 787 F.2d 76, 81-85 (2d Cir. 1986). See Pet. App. 6a. In these circumstances, claimant-initiated review "is preferable to a suit by administrative law judges, who are the umpires between claimants to social security benefits and the Social Security Administration" (*D'Amico* v. *Schweiker*, 698 F.2d at 906). The issue of ALJ standing to challenge the non-acquiescence policy has not divided the lower courts, and does not raise a question sufficiently important to warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00359